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EDITOR'S NOTE

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No. 86-572-CSY
Status: GRANTED

Title: Kentucky, Petitioner
v.
Sergio Stincer

Docketed:
October 6, 1986

Court: Supreme Court of Kentucky

Counsel for petitioner: Warren, Penny R.

Counsel for respondent: Posnansky, Mark A.

Entry	Date	Note	Proceedings and Orders
1	Oct 6 1986	G	Petition for writ of certiorari filed.
2	Oct 9 1986		Application for stay filed, and order denying same by Scalia, J., with in-chambers opinion, Oct. 15, 1986.
3	Oct 9 1986		Response to above application filed.
5	Oct 30 1986		Order extending time to file response to petition until November 19, 1986.
6	Nov 19 1986		DISTRIBUTED. December 5, 1986
7	Nov 21 1986	X	Brief of respondent Sergio Stincer in opposition filed.
8	Nov 21 1986	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	Dec 4 1986	X	Reply brief of petitioner Kentucky filed.
10	Dec 8 1986		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	Dec 8 1986		Petition GRANTED.
			**********
12	Dec 18 1986	G	Motion of respondent for appointment of counsel filed.
13	Dec 22 1986		DISTRIBUTED. Jan. 9, 1987. (Motion of respondent for appointment of counsel).
14	Jan 12 1987		Motion for appointment of counsel GRANTED and it is ordered that Mark A. Posnansky, Esquire, of Frankfort, Kentucky, is appointed to serve as counsel for the respondent in this case.
15	Jan 22 1987		Joint appendix filed.
16	Jan 22 1987		Brief amicus curiae of American Psychological Assn. filed.
18	Jan 22 1987		Brief of petitioner Kentucky filed.
19	Jan 22 1987		Brief amicus curiae of Committee of the CA District Attorneys Assn. filed.
20	Jan 22 1987		Brief amicus curiae of Arkansas, et al. filed.
21	Feb 2 1987		Record filed.
22	Feb 23 1987		Brief of respondent Sergio Stincer filed.
23	Feb 23 1987		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers filed.
24	Feb 23 1987		Brief amicus curiae of ACLU filed.
25	Mar 9 1987		Application of respondent for leave to file a brief on tthe merits in excess of the page limitation filed
26	Mar 9 1987		(A-663), and order denying same by Scalia, J., on March 10, 1987,
27	Mar 11 1987		SET FOR ARGUMENT. Wednesday, April 22, 1987. (3rd case).
29	Mar 20 1987		CIRCULATED.
30	Apr 11 1987	X	Reply brief of petitioner Kentucky filed.
31	Apr 22 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-572

Supreme Court, U.S.
FILED
OCT 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

COMMONWEALTH OF KENTUCKY

Petitioner

versus

SERGIO STINCER

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
COMMONWEALTH OF KENTUCKY

DAVID L. ARMSTRONG
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FOR PETITIONER

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QUESTIONS PRESENTED

I.

Whether The Supreme Court Of Kentucky Erroneously Expanded The Sixth Amendment To The United States Constitution To Require The Presence Of A Criminal Defendant At A Preliminary Pretrial Hearing To Determine Whether A Child Sexual Abuse Victim Understands The Difference Between The Truth And A Lie And, Thus, Is Competent To Testify.

II.

Whether The Supreme Court Of Kentucky Grieviously Erred By Refusing To Consider Harmless Error Or Prejudice And, Instead, Based Upon The Sixth Amendment, Created A Per Se Rule Of Reversible Error When A Criminal Defendant Is Excluded From Pretrial Competency Hearing For A Child Abuse Victim.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii-v
OPINION BELOW.....	1
JURISDICTION.....	2
STATEMENT OF THE CASE.....	2 - 9
REASONS FOR GRANTING THE WRIT.....	9-23

I. Whether The Supreme Court Of Kentucky Erroneously Expanded The Sixth Amendment To The United States Constitution To Require The Presence Of A Criminal Defendant At A Preliminary Pretrial Hearing To Determine Whether A Child Sexual Abuse Victim Understands The Difference Between The Truth And A Lie And, Thus, Is Competent To Testify.

II Whether The Supreme Court Of Kentucky Grieviously Erred By Refusing To Consider Harmless Error Or Prejudice And, Instead, Based Upon The Sixth Amendment, Created A Per Se Rule Of Reversible Error When A Criminal Defendant Is Excluded From Pretrial Competency Hearing For A Child Abuse Victim.

CONCLUSION.....	24
APPENDIX.....	1a-21a

TABLE OF AUTHORITIES

	Page(s)
CASES:	
Caldwell v. Mississippi, 472 U.S. ___, 86 L.Ed 2d 231 (1985)	20
California v. Carney, 471 U.S. ___, 86 L.Ed 2d, 406, 412, n.1 (1985)1	20
Com. v. Willis, Ky., ___ S.W.2d ___ (No. 85-SC-218-TG, rendered July 3, 1986, petition for rehearing pending; 55 L.W. 2069; 33 K.L.S. 9)	21, 22
Delaware v. VanArsdall, 475 U.S. ___, 89 L.Ed.2d 674 (1986)	16, 20
Estep v. Com., Ky., 663 S.W.2d 213 (1983)	23
Harris v. Com., Ky., 285 S.W.d 489, 493 (1956)	22
Hoskins v. Com., 188 Ky. 80, 221 S.W. 230, 233 (1920)	22
Illinois v. Allen, 397 U.S. 337 (1970)	21,22
Jordon v. Com., Ky., 703 S.W.2d 870, 872 (1985)	23
Michigan v. Long, 463 U.S. 1032 (1983)	19,20
People v. Breitweiser, 349 N.E.2d 454 (Ill.App. 1976)	12

TABLE OF AUTHORITIES

	Page(s)
CASES (CONT.):	
Moll v. State, 351 N.W.2d 639 (Minn.App. 1984)	11,12
Powell v. Com., Ky., 346 S.W.2d 731, 734 (1961)	22
Rushen v. Spain, 464 U.S. 114 (1983)	14,15,16
Scott v. Com., Ky., 615 S.W.2d 39, 42 (1981)	21
Snyder v. Massachusetts, 291 U.S. 97 (1934)	10,11
State v. Braggs, 604 S.W.2d 883 (Tenn.Cr. App. 1980)	13
State v. Richey, 490 P.2d 558 (Ariz. 1971)	12
State v. Taylor, 704 P.2d 443 (N.M.App. 1985)	12
State v. Warford, 389 N.W.2d 575 (Neb. 1986)	13
Stincer v. Commonwealth, Ky., 712 S.W.2d 939 (1986)	1,6,8
United States v. Ashe, 478 F.2d 661, 666 (D.C.Cir. 1973)	13
United States v. Gagnon, 470 U.S. ___, 84 L.Ed.2d 486 (1985)	10,14,15

TABLE OF AUTHORITIES

	Page(s)
CONSTITUTION:	
Sixth Amendment, U. S. Constitution	2
STATUTES:	
28 U.S.C. § 1257(3)	2
Section 421.200, Kentucky Revised Statutes	6
RULES:	
Kentucky Civil Rule 76.32	2
Rule 8.28 (1), Kentucky Rules of Criminal Procedure	21
TEXTS:	
23 A.L.R.4th 955, 977-980 (1983)	14
Eastman and Bulkley, Protecting Child Victim/ Witnesses: Sample Laws and Materials (Chicago: American Bar Association, 1986)	14,17,18
America's Missing & Exploited Children, U. S. Department of Justice, 1986	14
Victims of Crime: Proposed Model Legislation, U. S. Department of Justice, 1986.	14,18

No. _____

IN THE
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COMMONWEALTH OF KENTUCKY

Petitioner

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SERGIO STINCER

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
COMMONWEALTH OF KENTUCKY

The Commonwealth of Kentucky petitions for a writ of certiorari to review the judgment of the Kentucky Supreme Court in this case.

OPINION BELOW

The opinion of the Supreme Court of Kentucky (Appendix at 1a-20a) is reported as Stincer v. Commonwealth, Ky., 712 S.W.2d 939 (1986).

JURISDICTION

The judgment of the Supreme Court of Kentucky was rendered June 12, 1986. The Commonwealth's Petition for Rehearing pursuant to Kentucky Civil Rule 76.32 was denied by Order dated August 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The respondent was convicted in the Christian Circuit Court of Kentucky of sodomy in the first

degree pursuant to Section 510.070 of the Kentucky Revised Statutes and was sentenced by the jury to a prison term of twenty years on February 3, 1984. (Transcript of Record, hereinafter "TR," 17-18.) The conviction arose from an indictment charging respondent with engaging in deviate sexual intercourse in October 1983 with three children, two girls ages seven and eight and a boy age five. (TR 6.) The charges involving the five-year-old boy were dismissed at the Commonwealth's request due to reservations concerning the child's competency to testify. (Transcript of Evidence, hereinafter "TE," 14.)

From the evidence at trial the jury was entitled to believe that on respondent's birthday, October 14, 1983, he was caring for seven young children while his girlfriend, Mary Tandy, with whom he was living and the mother of three of the children, and her friend Marie Griffin, mother of the other four children, went to the grocery to buy him a cake and food for his birthday party. (TE 130-132, 143.) While

the mothers were gone, respondent called three of the children, sisters ages eight and seven and a boy age four, into another room. (TE 34-35, 51-53, 92.) Respondent tied a sock around each child's eyes, put chocolate pudding on his penis and then put his penis in the mouth of each child in turn. (TE 34, 51-53, 68-69, 91, 94, 112-113.) He told them he was giving them a pickle. (TE 78, 113.) The four-year-old boy testified he was first and that he could then see respondent repeating these acts with the girls. (TE 91, 112-113.) The girls were embarrassed and frightened witnesses and each began crying when accused of inconsistencies, but each testified that, on his birthday, respondent tied socks over their eyes, put chocolate pudding on his penis, and put his penis in their mouths. (TE 34-35, 52-55, 58, 68-69, 84.) The eight-year-old said he kept it in her mouth for three minutes. (TE 35.) The incident was reported a week later by an anonymous phone call to Social Services and the

children were interviewed separately by two social workers. (TE 146, 148, 150-151, 157-158.) Neither mother was aware of the incident at this time. (TE 137, 143-144.) The gist of the facts related by each child was the same. (TE 154, 161.)

Respondent admitted being alone with the children that afternoon, going to one of their rooms to play karate with them and feeding them chocolate pudding. (TE 171, 187, 193.) He denied blindfolding the children or engaging in deviate sexual intercourse with them. (TE 171, 187.) Respondent's defense was that his former girlfriend, Bonita Griffin, with whom he had lived was jealous of his present girlfriend and his many other girlfriends. (TE 173, 191-192.) He speculated that she made up the incident and somehow persuaded the children to tell about it. (TE 189.)

Before testimony was heard from any witnesses, the trial judge held a preliminary hearing in chambers to consider the competency

of the child witnesses.[1] (TE 14-25.) The seven and eight-year-old sisters were asked to recall background facts, such as their birthdays and names of their school, Sunday school and teachers. (TE 16-17, 20-21.) Each was then questioned as to the difference between the truth and a lie, the consequences of not telling the truth, and each promised to tell the truth. (TE 17-19, 21-25.) No facts of the case or testimony was mentioned.[2] Defense counsel was permitted to cross-examine each child. (TE 18-19, 23, 25.) Counsel had no disagreement with the preliminary rulings on competency. (TE 20, 25.)

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1 Witnesses are presumed competent. KRS 421.200. The prosecutor noted the jury would ultimately decide the issue. (TE 14.)

2 During trial, a separate competency hearing was held concerning the four-year-old boy. (TE 88-101.) Respondent either was present or made no request to be present--the record is silent and no issue was raised on appeal. It is to this hearing that Justice Stephenson refers when he criticizes questions on substantive testimony. Stincer, 712 S.W.2d at 942.

Immediately prior to the competency hearings, counsel initially agreed that respondent need not be present and explained to respondent the nature of the proceedings and that he should wait outside. (TE 15.) Respondent then apparently requested that he be present.[3] (TE 15.) Counsel acknowledged that respondent could be excluded, but added: "To protect my client, I'll ask that he be allowed to stay." (TE 15.) The request was denied. (TE 15.)

On direct appeal to the Supreme Court of Kentucky, respondent claimed he was denied due process and his right of confrontation by being excluded from the competency hearings prior to trial. (Appellant's Brief, pp. 14-16.) He relied on state and federal cases interpreting the right of confrontation. The Commonwealth

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[3] Respondent spoke little English and his remark could not be transcribed. (TE 15, 26.) An interpreter was used during trial testimony. (TE 26-28, 168-195.)

responded there was no denial of his constitutional rights and, if there were, it was harmless error since the children were examined on this issue in open court in respondent's presence. (Appellee's Brief, pp. 14-16.)

The Supreme Court of Kentucky reversed the conviction and remanded the case for retrial on the ground that exclusion from the pretrial competency hearing denied respondent his right of confrontation under the Sixth Amendment of the United States Constitution and Section Eleven of the Kentucky Constitution. Stincer, 712 S.W.2d at 940. The court acknowledged that "The main purpose of the confrontation rule, under both the Sixth Amendment and Kentucky's bill of rights, is to ensure the defendant's right to cross-examine the witnesses against him at trial." Id., Appendix, p. 3. Nonetheless, the court held "the competency hearing was a crucial phase of the trial and that appellant had the absolute right to be present and be represented by counsel." Id., Appendix, p. 3.

The Commonwealth's Petition for Rehearing, emphasizing that respondent had at best only a Fifth and Fourteenth Amendment Due Process right to be present and that any error was harmless, was summarily denied August 7, 1986.

REASONS FOR GRANTING THE WRIT

This petition presents a conflict among the states' highest courts as to whether the Sixth Amendment Confrontation Clause grants a criminal defendant a right to be present at a preliminary competency hearing of a child victim. It includes a refusal by the Supreme Court of Kentucky to consider whether the alleged violation can be harmless beyond a reasonable doubt and, thus, is directly in conflict with recent precedents of this Court. The decision also conflicts with the public policy reflected in local and national legislative efforts to reduce the traumatization of child sexual abuse victims by the criminal justice system. Lastly, the petition provides an opportunity for this Court to clarify the constitutional source and relevant

standards for reviewing "right to be present" claims and reduce the confusion reflected in state and federal decisions concerning pretrial criminal proceedings.

1. In United States v. Gagnon, 470 U.S. ___, 84 L.Ed.2d 486 (1985), this Court reiterated that the right to presence is rooted in the Confrontation Clause of the Sixth Amendment but "recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." 84 L.Ed.2d at 490. In Gagnon it was held that an in camera discussion during trial between the judge, a juror, and Gagnon's counsel, was not the sort of event where a defendant has a Fifth Amendment right to attend personally. The standards in Snyder v. Massachusetts, 291 U.S. 97 (1934), were reaffirmed as granting a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend

against the charge." Id. Due process permits a defendant to be present "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Id. Snyder cautioned there is no privilege to be present when "presence would be useless, or the benefit but a shadow." 201 U.S. at 106-107. The distinction between "proceedings at the trial and those before and after" was emphasized. Id. This Court cautioned, "Confusion [of thought] will result again if the privilege of presence be identified with the privilege of confrontation, which is limited to the stages of the trial when there are witnesses to be questioned." Id.

a. Four state courts have followed these precedents and held there was no denial of confrontation by excluding the defendant from a preliminary competency hearing. Moll v. State, 351 N.W.2d 639 (Minn.App. 1984), recognized the intimidation to child sex abuse victims caused by the presence of the defendant and the

opportunity for presence and full cross-examination in the courtroom. The Moll court also held exclusion did not violate due process since the presence of the defendant would serve no purpose other than to intimidate the child. 351 N.W.2d at 644. People v. Breitweiser, 349 N.E.2d 454 (Ill.App. 1976), another child sexual abuse case, considered the limited scope of the competency proceeding, the uselessness of the defendant's presence, and the opportunity to confront the witness during trial. The court held there was no denial of confrontation. In State v. Taylor, 704 P.2d 443 (N.M.App. 1985), a child sex abuse case, the court similarly rejected confrontation and due process claims and further held any error would be harmless. State v. Richey, 490 P.2d 558 (Ariz. 1971), also involving sexual abuse of a child, rejected confrontation claims on the ground that competency is a legal question and there is no compelling need for the defendant's presence. Because the decision of the Supreme Court of

Kentucky directly conflicts with the decisions of these state courts and the precedents of this Court, review should be granted.

One state court decision may conflict in part. State v. Braggs, 604 S.W.2d 883 (Tenn.Cr. App. 1980), concluded it was error to exclude the defendant from the child's competency hearing but the error was harmless in light of the subsequent cross-examination in open court on competency. 604 S.W.2d at 885. Two other courts, in dicta, have stated the Confrontation Clause provides a right to be present at competency hearings. United States v. Ashe, 478 F.2d 661, 666 (D.C.Cir. 1973); State v. Warford, 389 N.W.2d 575 (Neb. 1986) [55 L.W. 2069]. These conflicts or confusion further support granting of the petition.

b. The importance of this question in child sexual abuse cases cannot be overstated. Legislatures all across the country are recognizing the widespread incidence of abused children and are rapidly enacting reforms to

reduce the traumatization and intimidation of child victims by the criminal justice system.[4] The effect of the decision in the present case is to increase trauma and intimidation and to chill prosecutions with no positive impact on the fairness of trial.

c. Confusion also abounds on many related issues of the right to be present at hearings involving witnesses or jurors. 23 A.L.R.4th 955, 977-980 (1983). This Court recently reviewed two cases involving communications with jurors but declined to consider whether there was error of constitutional dimension. Rushen v. Spain, 464 U.S. 114 (1983) [per curiam]; United States v. Gagnon, 470 U.S. ___, 84 L.Ed.2d 486 (1985) [per curiam]. The need for

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4 Eastman and Bulkley, Protecting Child Victim/Witnesses: Sample Laws and Materials (Chicago: American Bar Association, 1986); America's Missing & Exploited Children, U. S. Department of Justice, 1986; Victims of Crime: Proposed Model Legislation, U. S. Department of Justice, 1986.

guiding standards has been recognized. Id. (Brennan, J., joined by Marshall, J., dissenting.) Because of the conflict among the states and the lack of guiding standards and because the question raised is of particular nationwide significance, the petition should be granted and the question presented reviewed.

2. In Rushen v. Spain, 464 U.S. 114 (1983), this Court held that an ex parte communication between the trial judge and a juror during trial was harmless error[5] where the conversations were innocuous, no facts were discussed and there was convincing evidence the jury's deliberations were not biased. It "emphatically disagree[d]" that such communication can never be harmless error and reminded lower courts that "remedies should be tailored to the injury suffered. . .and should not unnecessarily

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5 This Court did not consider whether Spain's right to presence was implicated since petitioners throughout conceded federal constitutional error. 464 U.S. at 117, note 2.

infringe on competing interests." 464 U.S. at 118. Similarly, in Delaware v. VanArsdall, 475 U.S. ___, 89 L.Ed.2d 674 (1986), involving a denial of cross-examination, this Court once again "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." 89 L.Ed.2d at 684. The focus must be on a fair trial, not perfection or the "virtually inevitable presence of immaterial error." Id. at 684-685.

a. Contrary to these clear precedents, the Supreme Court of Kentucky held that the Confrontation Clause grants a criminal defendant "the absolute right to be present" at a pretrial hearing to determine the competency of the child prosecuting witnesses. Appendix, p. 3. The court focused on the fact that, absent testimony by the sexually abused children, there may have been no trial and held the conviction must be

reversed. Such analysis would lead to reversal in almost every child sex abuse case where the criminal defendant is not present at a victim's competency hearing.

b. This Court has already stated it is the "whole record" which must be reviewed and the fairness of the trial which must be the focus. In Kentucky, and in a large number of jurisdictions, the test of competency is the limited inquiry of whether the child knows the difference between the truth and a lie and appreciates the obligation to tell the truth.[6] The testimony itself and its credibility and weight are assessed by the jury. An even larger number of jurisdictions and the federal courts deem all persons competent and have abolished automatic competency hearings.[7] Eight states presume

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6 Eastman and Bulkley, Protecting Child Victim/Witnesses: Sample Laws and Materials (Chicago: American Bar Association, 1986), 45-46.

7 Id., 43-44.

competency of children or permit testimony without prior qualification.[8] Typically, no testimony is taken relevant to guilt or innocence and the defendant's presence would be useless. The criminal defendant is provided a full opportunity to confront and cross-examine the child at trial and to explore any issue of credibility. The record in the present case meets these criteria and does not disclose any way respondent could have assisted his counsel at the preliminary hearing. The fact that respondent could speak little English and requested an interpreter while in open court strongly suggests his sole motivation was to intimidate the young victims. Finally, the testimony of the two girls was corroborated by the boy's testimony.

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8 Id., 43. See also: Victims of Crime: Proposed Model Legislation, Sec. VII (U.S. Department of Justice, 1986).

In summary, exclusion of respondent from the preliminary hearing did not contribute to the verdict and, if error, was harmless beyond a reasonable doubt. Because the Supreme Court of Kentucky failed to follow this Court's precedents and review the entire record for harmlessness, the petition should be granted, the judgment vacated, and the case remanded for consideration of harmless error.

3. An analysis of the opinion below and relevant case law refutes any potential claim that the Kentucky decision rests upon an adequate and independent state ground.

In Michigan v. Long, 463 U.S. 1032 (1983), this Court held it will assume there are no adequate and independent state court grounds "when it is not clear from the opinion itself" and the decision fairly appears to be interwoven with the federal law. 463 U.S. at 1042. State courts were advised that a decision need only indicate clearly and expressly that it is based on bona fide separate adequate and independent

grounds to avoid review. Id at 1041. These standards have been reaffirmed in recent cases, e.g., California v. Carney, 471 U.S. ___, 86 L.Ed 2d, 406, 412, n.1 (1985); Caldwell v. Mississippi, 472 U.S. ___, 86 L.Ed 2d 231 (1985); Delaware v. VanArsdell, 475 U.S. ___, 89 L.Ed 2d 674, 682, n.3 (1986).

a. The plurality decision below invokes the Sixth Amendment to the United States Constitution and Section Eleven of the Kentucky Constitution in tandem and makes no distinction between them (App. pp. 1a, 3a). The Court declines to adopt the interpretations of other states on the federal consitutional issue but makes no clear and express statement that this conclusion is based on state law. App. p. 941. The dissent's extensive reliance on precedents of this Court and common law makes it clear that "the state court decided the case the way it did because it believed that federal law required it to do so." Long, 463 U.S. at 1041. (App. 12a-20a)

In the case of Scott v. Com., Ky., 615 S.W.2d 39, 42 (1981), involving a defendant's refusal to attend trial, the Court construed Rule of Criminal procedure [RCr] 8.28 (1) as follows:

> "RCr 8.28 has codified the common law right to be present at criminal proceedings, which has been recognized and preserved in the 6th Amendment to the United States Constitition and Section 11 of the Kentucky Constitution."

In construing the defendant's waiver of his right, the Court relied upon the analysis in Illinois v. Allen, 397 U.S. 337 (1970) Id. at 43.

In the case of Com. v. Willis, Ky., ___ S.W.2d ___ (No. 85-SC-218-TG, rendered July 3, 1986, petition for rehearing pending; 55 L.W. 2069; 33 K.L.S. 9) the Court expressly stated:

> "The requirement in the Kentucky Constitution to 'meet witnesses face to face' is basically the same as the Sixth Amendment to the federal constitution which provides a right of confrontation." 33 K.L.S. 9, 16.

The Court continued:

> "There is no authority to support the proposition that the right of confrontation guaranteed by the Kentucky Constitution should be construed more stringently than the same right in the United States Constitution." 33 K.L.S. 9, 17.

Prior to Illinois v. Allen, supra, Kentucky cases consistently questioned whether preliminary examinations of proposed witnesses may properly be regarded as part of the trial, but the question was not reached due to the alternative ground of waiver of any constitutional right[9]. In the only decision previously to consider the constitutional source of the right to be present, the Court expressly held that this right is a requirement of Section Eleven of the Kentucky Constitution and "a condition of due process of law assured by the Fourteenth Amendment to the Federal Constitution." Powell v. Com., Ky., 346 S.W.2d 731, 734 (1961).

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9 Harris v. Com., Ky., 285 S.W.d 489, 493 (1956); Hoskins v. Com., 188 Ky. 80, 221 S.W. 230, 233 (1920)

In the same manner, the Supreme Court of Kentucky has interpreted other provisions of the Kentucky Bill of Rights as being identical to, and no more stringent than, the requirements of the United States Constitution. Jordon v. Com., Ky., 703 S.W.2d 870, 872 (1985) (Double Jeopardy Clause identical); Estep v. Com., Ky., 663 S.W.2d 213 (1983) (federal construction of Fourth Amendment adopted; contrary decisions overruled). The consistent reliance of the Supreme Court of Kentucky on the United States Constitution when interpreting its own Constitution and rules of procedure clearly demonstrate that its decision on this constitutional issue rests primarily on federal law and there is no adequate and independent state court ground.

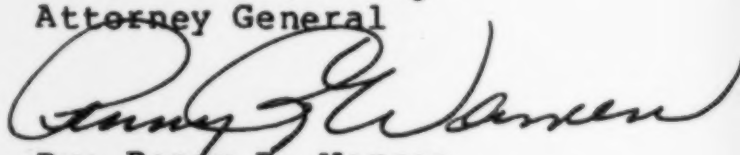
Because the state court believed federal law required it to decide the case the way it did, this Court has jurisdiction and should grant the petition and review the question presented.

CONCLUSION

The petition for writ of certiorari should be granted.

The Commonwealth of Kentucky
Petitioner

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APPENDIX

TO BE PUBLISHED
RENDERED: June 12, 1986

SUPREME COURT OF KENTUCKY

84-SC-496-MR

SERGIO STINCER — APPELLANT

V. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
(83-CR-219)

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY CHIEF JUSTICE STEPHENS

REVERSING

Appellant was convicted by a jury in the Christian Circuit Court of sodomy in the first degree. He was sentenced to twenty (20) years imprisonment.

Of primary thrust on this appeal is appellant's contention that he was denied his right to confrontation, under the Sixth Amendment of the United States Constitution and Section Eleven of the Kentucky Constitution,

when the trial court excluded him personally from a pre-trial hearing to determine whether the child prosecuting witnesses were competent to testify. We agree with appellant's argument and reverse on that ground.

Appellant was indicted in the Christian Circuit Court and charged with the first degree sodomy of an eight year old girl, a seven year old girl, and a five year old boy. During an in chambers hearing held prior to trial the Commonwealth sought dismissal of the charge in regards to the five year old on the grounds that the child was incompetent to testify. After granting that motion, the trial court prepared to conduct a hearing to determine if the two remaining prosecuting witnesses were competent to testify. At that time appellant specifically voiced his desire to be present personally during the competency hearing. Over defense counsel's objection, the trial court overruled his request and excluded appellant from the hearing.

case, as their testimony comprised the gravamen of the charges against appellant Stincer.

Unlike the situation presented in Harris v. Commonwealth, Ky., 285 S.W.2d 489 (1956), where the accused waived his right to be present during the preliminary examination of proposed witnesses by his failure to assert the privilege, appellant Stincer vociferously requested to be present at the hearing to assist his counsel with cross-examination of the prosecuting witnesses. Appellant clearly asserted and was denied his constitutional right to meet the witnesses face to face.

The Commonwealth maintains that it was not error for the prosecuting witnesses to be examined for their competency outside appellant's presence when appellant's counsel was present on his behalf. We are urged to adopt the proposition that the criminal defendant himself does not have the right to attend in chambers examinations held to determine the competency of

child witnesses, Moll v. State, 351 N.W.2d 639 (Minn. App. 1984). This we decline to do.

Previously this court held in Thomas v. Commonwealth, Ky., 437 S.W.2d 512 (1969) and Harris, supra., that a criminal defendant's right to be present in person did not extend to the reception of "legal arguments." However, a preliminary hearing to determine the competency of a prosecuting witness to testify certainly can not be termed the reception of purely legal argument as discussed in Thomas and Harris, supra., and therefore we find those cases distinguishable and that general proposition inapplicable in this case.

A criminal defendant has the right to attend hearings to determine the competency of witnesses. The trial court's determination of whether the prosecuting witnesses could testify was pivotal. Because the children's testimony was sine qua non to the prosecution's case, appellant's trial might not have taken place had

the trial court determined that the children were not competent to testify.

Although this court recognizes the problems and pressures encountered when dealing with child witnesses, when a defendant is placed on trial by the state for criminal conduct he is entitled to be present and to assist his counsel at hearings to determine the competency of witnesses against him.

Appellant also contends that the trial court erred in refusing to direct a verdict of acquittal, in ruling that a four year old child witness was competent to testify and in allowing state social workers to care for the prosecuting witnesses during a trial recess. While none of these issues constitute reversible error, we shall briefly address each for purposes of retrial.

After carefully reviewing the testimony at trial, we determine that the trial court correctly found the evidence in the case to be sufficient to withstand a motion for a directed

verdict of acquittal. At trial the child witnesses identified appellant and the acts perpetrated against them. Appellant was then accorded his right to cross-examine the witnesses. The evidence presented was clearly sufficient to withstand appellant's motion for a directed verdict of acquittal and it was not unreasonable for the trial court to do so. Trowel v. Commonwealth, Ky., 550 S.W.2d 530 at 533 (1977).

Likewise, we find no merit in appellant's contention that the trial court erred in ruling that a four year old witness, Eric Tandy, was competent to testify. The trial judge is in the unique position to observe witnesses and to determine their competency. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. The trial court questioned Eric Tandy in depth and the record on appeal does not substantiate appellant's claim

that the trial court's ruling was clearly erroneous.

Finally, appellant contends the trial judge abused his discretion by allowing state social workers to care for the child witnesses during a trial recess. Prior to placing the children in the care of the social workers, the trial judge properly admonished the social workers to refrain from discussing the case during lunch with the children. Although this court does not condone or encourage this practice, as the record is silent on this issue, this court declines to speculate as to the effect of the social workers brief supervision of the children. We cannot hold the trial jduge abused his discretion in permitting social workers to care for child witnesses during a luncheon recess.

We therefore reverse the judgment of the trial court on the ground that appellant was denied his right to confrontation by the trial

court's ruling that he be excluded from a pre-trial competency hearing.

Stephens, C. J., Gant and Vance, JJ., concur. Stephenson, J., concurs in a separate opinion and is joined by Leibson, J. Wintersheimer, J., dissents in a separate opinion and is joined by White, J.

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RENDERED: June 12, 1986
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

84-SC-496-MR

SERGIO STINCER — APPELLANT

V. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
83-CR-219

COMMONWEALTH OF KENTUCKY — APPELLEE

CONCURRING OPINION BY JUSTICE STEPHENSON

I agree with the majority opinion. However, it should be extended so as to mandate that the competency-to-testify proceeding by the trial court be held in open court and before the jury. It is the province of the trial court to ascertain whether the child is sufficiently intelligent to observe, recollect, and narrate the facts and has a moral obligation to speak the truth. Moore v. Commonwealth, Ky., 384 S.W.2d 498 (1964). However, this inquiry is

important to the jury in evaluating the credibility of the child's testimony.

Further, I believe it highly improper in a hearing to determine competency to testify to inquire into substantive testimony, as was done here with one of the child witnesses. Conducting this hearing before the jury would eliminate the temptation to hear substantive testimony about the case.

Leibson, J., joins in this concurring opinion.

RENDERED: June 12, 1986
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

84-SC-496-MR

SERGIO STINCER — APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
No. 83-CR-219

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I must respectfully dissent from the majority opinion because the right of confrontation was not violated when the defendant was excluded from the competency hearing prior to trial. The majority decision misapplies and over extends the right to confrontation.

There never was at common law any recognized right to an indispensable thing called "confrontation" as distinguished from cross-examination.

See Wigmore on Evidence § 1397 (Chadbourn Revision 1979).

The in-chambers hearing to determine the competency of child witnesses is not a critical stage of the proceedings related to the ultimate question of innocence or guilt. The competency determination is one which rests in the discretion of the trial judge. It is the responsibility of the trial judge to examine the witness to ascertain capacity. See Muncie v. Commonwealth, 308 Ky. 155, 213 S.W.2d 1019 (1948). Reserving discretion to the trial judge to exclude the defendant does not interfere with the right of the accused to confrontation because if the child witness is determined to be competent, the defendant will have an ample opportunity to fully assist counsel in the right of cross-examination in open court before the jury. A defendant does not have an absolute right to attend the proceedings when his presence would be useless or the benefit but a shadow. See Snyder v. Massachusetts, 291 U.S.

97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934).

It should be recognized that many children as well as adults are intimidated by the technical legal process. I agree with the Minnesota Court of Appeals when it said that children of sexual abuse have enough difficulty testifying in open court without the added burden of the possibility of an in-chambers intimidation factor arising from the presence of the defendant. See Moll v. State, Minn.App., 351 N.W.2d 639 (1984).

In addition to consideration of fairness to all, the burden of the young sex victims should be made lighter and not more onerous, not only to insure that the abusers are fully prosecuted but to aid in the victim's recovery from this traumatic experience. Moll, supra.

In State v. Braggs, Tenn. Crim. App., 604 S.W.2d 883 (1980), it was held that an examination of a child outside of the defendant's presence was harmless error. In that case,

defense counsel was allowed to question the child in open court concerning her competency. Here, defense counsel examined the children as to their competency before the jury.

Section 11 of the Kentucky Constitution permits an accused to meet the witnesses face-to-face. The principal purpose of the confrontation rule is to insure the right of cross-examination and to protect the defendant from conviction by means of ex parte testimony given in his absence. See Harris v. Commonwealth, Ky., 315 S.W.2d 630 (1958). The witness confrontation rule concerns the method by which evidence is presented to the jury during the trial.

The essential purpose of the right of the accused to confront the witnesses against him is to secure the opportunity of cross-examination which cannot be had except by the direct and personal putting of questions and the obtaining of immediate answers. This right is basically a

trial right and includes the right to cross-examine and the right of the accused to have the trier of fact weigh the demeanor and credibility of the witnesses against him. See 21A Am.Jur.2d §720 Confrontation, Criminal Law; Wigmore on Evidence § 1395 et seq., Purpose and Theory of Confrontation.

The common law right to confrontation is not without certain well recognized exceptions. Such exceptions may be enlarged from time to time if there is no material departure from the reason underlying the constitutional mandate guaranteeing to the accused the right of confrontation.

The right to be confronted by the witnesses relates only to the actual trial for the commission of the offense. A witness's testimony from a prior preliminary hearing may be admissible against the defendant provided the confrontation clause of the Sixth Amendment is not violated. See 21 Am.Jur.2d § 723.

The presence of the accused is not necessary during preliminary proceedings which do not affect the question of his guilt or innocence. See Harris v. Commonwealth, supra; Hoskins v. Commonwealth, 188 Ky. 80, 221 S.W. 230 (1920).

The purpose of a competency hearing is to determine the appropriateness of the testimony from a witness who is under some disability. Such a hearing does not directly relate to the innocence or guilt of the accused but only to the propriety of admitting the testimony of a witness to the jury. The jury is the trier of the ultimate fact of innocence or guilt.

It is a maxim of Kentucky law that the courts must be careful to preserve the right of a defendant to be present at every stage of the trial, beginning with the swearing of the jury and ending with the return of the verdict. Obviously, the defendant is not entitled to be in the jury deliberations, consequently there are other proceedings which he may not be entitled to be present. The better definition

of this marvelous legal phrase is that the defendant is entitled to be present at all phases of the trial which have a direct relationship to a determination of guilt or innocence by the trier of fact.

Clearly the jury as trier of fact witnessed both the direct examination and the cross-examination. They were able to reach a verdict based on the evidence presented to them. It is not appropriate that this Court disturb that verdict. There is no demonstration of prejudice to the accused in this case.

The Sixth Amendment to the Federal Constitution adopted in 1787 requires that in criminal prosecutions the accused shall have the right to confront the witnesses against him. Kentucky, as well as almost every state in the nation, has a similar provision. If literally applied, such requirements would prevent entirely the use for the prosecution of former testimony, dying declarations, public records or other evidence coming under the traditional exceptions to the

hearsay rule. They have not been literally applied.

In the late 1700's when these provisions were first included in the American Bill of Rights, the general rule against hearsay had been accepted in England for a hundred years, but it was equally well established that the former testimony taken in the presence of the accused and subject to cross-examination was received against him if the witness was dead or unavailable. It seems very probable that the purpose of the American provisions for confrontation was to guarantee the maintenance in criminal cases of the hard-won principle of the hearsay rule without abandoning the accepted practice of using former testimony given subject to cross-examination. It forbade the practice of using depositions taken in the absence of the accused which had been much complained of and was later abandoned by the English system and forbidden by statute.

As stated by Justice Cardozo in Snyder, supra, at page 682, "A fertile source of perversion in constitutional theory is the tyranny of labels." The phrases "right to confrontation" and "right to be present at every stage of the trial," must be applied in such a way as to produce a fair result. The right to be present and the right to confront does not confer a right to intimidate. It is the duty of the court to balance the rights of the accused with those of the victim. I believe that the sound discretion of the trial judge is the best barometer to determine fairness. A competency examination of a child witness is within the particular responsibility of the trial judge. In the absence of abuse of discretion or prejudice to the accused, I believe a reviewing court should not disturb the decision of the trial judge. Consequently, I would affirm the conviction.

White, J., joins in this dissent.

SUPREME COURT OF KENTUCKY

NO. 84-SC-496-MR

SERGIO STINCER — APPELLANT

V. APPEAL FROM CHRISTIAN CIRCUIT COURT
NO. 83-CR-219

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

Appellee's petition for rehearing of the court's opinion rendered June 12, 1986, is denied.

Stephens, C.J.; Gant; Leibson; Stephenson; and Vance, J.J., concur. Wintersheimer, J., would grant the petition.

ENTERED: August 7, 1986

/s/ Robert F. Stephens
Chief Justice

OPPOSITION

BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

NO. 86-572

DEC 5 PAGE 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

SERGIO STINCER — RESPONDENT

ON PETITION FOR WRIT
OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

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NOVEMBER 19, 1986

QUESTION PRESENTED

Whether This Court Should Grant Certiorari And Review The Decision Of The Kentucky Supreme Court On The Issue Of Whether Respondent Could Be Excluded From A Competency Hearing When the Court's Opinion Was Based On Section Eleven Of The Kentucky Constitution.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS INVOLVED	iv
STATUTORY PROVISIONS INVOLVED	iv
REASONS FOR DENYING THE WRIT	1-7
I. THE KENTUCKY SUPREME COURT BASED ITS HOLDING UPON THE KENTUCKY CONSTITUTION AND KENTUCKY LAW	1-5
A. This Decision Does Not Conflict With Other Reported Cases	1-2
B. The Harmless Error Doctrine Is Not Relevant Or Material	2
C. The Kentucky Supreme Court Relied Upon Section Eleven Of The Kentucky Constitution	2-5
II. KENTUCKY HAS NOW ENACTED A STATUTE OBVIATING THE SITUATION WHICH OCCURRED IN THIS CASE	5-7
CONCLUSION	7

TABLE OF AUTHORITIES

	PAGE
CASES:	
Browne v. Union Pac. R.Co., 267 U.S. 255 (1925).....	3
Caldwell v. Mississippi, ___U.S.___, 105 S.Ct. 2633 (1985).....	4
Carbo v. United States, 364 U.S. 611 (1961).....	7
Commonwealth v. Willis, Ky., ___ S.W.2d ___ (No. 85-SC-218-TG, rendered July 3, 1986; 55 L.W. 2069.....	6
Faye v. Noia, 372 U.S. 391 (1963).....	4
Harris v. Nelson, 394 U.S. 286 (1969).....	7
Henry v. Mississippi, 379 U.S. 443 (1965).....	4
Michigan v. Long, 463 U.S. 1032 (1983).....	4
Moll v. State, 351 N.W.2d 639 (Minn. App. 1984).....	1
Murdock v. City of Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875).....	4
New York Times Co. v. Jascalevich, 439 U.S. 1317 (1978).....	2
Oregon v. Hass, 420 U.S. 714 (1975).....	3
Phyle v. Duffy, 334 U.S. 431 (1948).....	3
People v. Breitweiser, 349 N.E.2d 454 (Ill.App. 1976).....	1
Powell v. Commonwealth, Ky., 346 S.W.2d 731 (1961)...	3
Ross v. Moffitt, 417 U.S. 600 (1974).....	7
Rushen v. Spain, 464 U.S. 114 (1983).....	2
State v. Richey, 490 P.2d 558 (Ariz. 1971).....	1
State v. Taylor, 704 P.2d 443 (N.M. App. 1985).....	1
CONSTITUTION:	
Eleventh Section, Kentucky Constitution.....	2,3,4,5,6
Sixth Amendment, U.S. Constitution.....	1,2,3,5
STATUTES:	
KRS 421.350.....	6
RULES:	
Rule 17, United States Supreme Court.....	1

CONSTITUTIONAL PROVISIONS INVOLVED

Section Eleven of the Kentucky Constitution provides, in pertinent part:

> "In all criminal prosecutions the accused has the right . . . to meet the witnesses face to face."

STATUTORY PROVISIONS INVOLVED

KRS 421.350(3) of the Kentucky Revised Statutes reads as follows:

> The court may, on the motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

REASONS FOR DENYING THE WRIT

I.

THE KENTUCKY SUPREME COURT BASED ITS HOLDING UPON THE KENTUCKY CONSTITUTION AND KENTUCKY LAW.

The critical question before this Court in regard to the petition for writ of certiorari is whether there is any legal basis for a grant of certiorari. It is strenuously submitted that none of the criteria listed under Rule 17 of this Court have been met. Quite simply, this case does not concern a federal question. This case was resolved on the basis of Kentucky state law and the Kentucky Constitution.

A. This Decision Does Not Conflict with Other Reported Cases.

Petitioner argues that this Court should grant certiorari because there exists "conflicts or confusion" among the reported decisions on this issue. (Petition for Writ, 13). Respondent disagrees.

Petitioner has cited four state cases which allow a competency hearing to be held out of the presence of the defendant.[1] In all of these cited cases, the state court decided that neither the Sixth Amendment nor their state constitution required the presence of the defendant during a competency hearing. Petitioner's argument would have merit if the Kentucky Supreme Court based its decision upon the Sixth Amendment. The Court cited the Sixth Amendment, but plainly based its decision on Section Eleven of the Kentucky Constitution. It could not be more clear from the language of the Court's opinion that this decision was based upon state law. In fact, the Kentucky Supreme Court specifically cites Moll v. State, supra, and acknowledges the existence of contrary decisions in other states. But the Court affirmatively declined to follow those decisions. The fact that

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[1] State v. Taylor, 704 P.2d 443 (N.M. App. 1985); Moll v. State, 351 N.W.2d 639 (Minn. App. 1984); People v. Breitweiser, 349 N.E.2d 454 (Ill.App. 1976); State v. Richey, 490 P.2d 558 (Ariz. 1971).

the Court made this assertion is further evidence that this case was decided on Kentucky state law.

B. The Harmless Error Doctrine Is Not Relevant Or Material.

The Petitioner also asserts that the Kentucky Supreme Court erred by not considering the doctrine of "harmless error." (Petitioner for Writ, 19). The simple response to this argument is, again, that the Kentucky Supreme Court based its decision on state constitutional law. It is therefore not material nor relevant to this Court whether "harmless error" was considered. Petitioner's reliance upon Rushen v. Spain, 464 U.S. 114 (1983) is misplaced. That case was decided upon federal constitutional grounds. A federal district court had issued a writ of habeas corpus based upon a violation of federal law. The case was, therefore, properly before this Court on the federal issue. In the case at bar, the issue has been decided on state constitutional grounds. This Court should not grant certiorari to decide whether the Kentucky Supreme Court should or should not employ a "harmless error" test in interpreting its own state constitution. New York Times Co. v. Jascalevich, 439 U.S. 1317, 1318 (1978).

C. The Kentucky Supreme Court Relied Upon Section Eleven Of The Kentucky Constitution.

Petitioner misrepresents the holding of the Kentucky Supreme Court when she states that "the Supreme Court of Kentucky held that the Confrontation Clause grants a criminal defendant 'the absolute right to be present' at a pretrial hearing to determine the competency of the child prosecuting witnesses." (Petition for Writ, 16). The opinion of the Court actually reads as follows:

> In addition to the right of confrontation provided by the Sixth Amendment to the United States Constitution, the Eleventh Section of the Bill of Rights of the Kentucky Constitution guarantees the accused in a criminal prosecution the right to be heard by himself counsel and to meet the witnesses (against him) face to face. (Petition for Writ, 3a).

The Kentucky Supreme Court cites Powell v. Commonwealth, Ky., 346 S.W.2d 731 (1961). That case, quite clearly, was decided on both state and federal constitutional grounds. Petitioner's assertion that the Court "decided the case the way it did because it believed that federal law required it to do so" (Petition for Writ, 20) is wholly unsupported. The state court made it abundantly clear that this case was being decided on state, as well as federal, constitutional grounds.

Another factor which leads one to the conclusion that the Kentucky Supreme Court applied state constitutional law is the applicable section of the Kentucky Constitution. Section Eleven of the Kentucky Constitution reads, in pertinent part, as follows: "In all criminal prosecutions the accused has the right. . . to meet the witnesses face to face..." It can immediately be seen that this state constitutional guarantee goes further than the applicable federal constitutional provision. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ." The Kentucky Constitution, therefore, has the added requirement that the witnesses must be confronted "face to face." This Court has clearly held that "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." Oregon v. Hass, 420 U.S. 714, 719 (1975) (Emphasis in original).

It is well settled that, historically, this Court will not grant review where there exists adequate state grounds to support the action of the state court. Browne v. Union Pac. R.Co., 267 U.S. 255, 259 (1925). In Phyle v. Duffy, 334 U.S. 431, 443-444 (1948), this court held that a death row inmate's challenge to a California procedural law regarding execution of insane persons presented no federal constitutional question because it could not be said that the decision "may not rest on an adequate non-federal ground."

It has also been held that "this Court will decline to review state court judgments which rest on independent and

adequate state grounds, notwithstanding the co-presence of federal grounds." Faye v. Noia, 372 U.S. 391, 428 (1963). In the case at bar, the decision clearly rested on the Kentucky Supreme Court's interpretation of the Kentucky Constitution. The fact that the federal constitution was also mentioned is of no consequence. The fact that the federal constitution is co-present in this case does not warrant a grant of certiorari since the decision rested plainly upon the Kentucky Constitution.

The decision of the Kentucky Supreme Court interpreted Section Eleven of the Kentucky Constitution and state substantive law as opposed to state procedure. As early as 1875, this Court held that review would not be undertaken where issues of state substantive law are decided in state court. Murdock v. City of Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875). This decision was cited in Henry v. Mississippi, 379 U.S. 443, 446-447 (1965) wherein it was held that "[u]nder the view taken in Murdock of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on question of state law."

More recently in Caldwell v. Mississippi, ___U.S.___, 105 S.Ct. 2633, 2638-2639 (1985), this Court, quoting from Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983), reiterated the rule that "[i]f the state court decision indicated clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." In the case at bar, it could not be more clear that the Kentucky Supreme Court has based its decision, alternatively, on state constitutional grounds. Contrary to Petitioner's assertion (Petition for Writ, 23), there is absolutely nothing to indicate that "the state court believed federal law required it to decide the case the way it did."

Petitioner argues that "[t]he dissent's extensive reliance on precedents of this Court and common law makes it clear that 'the state court decided the case the way it did because it believed that federal law required it to do so.'" (Petition for Writ 20). Respondent strenuously disagrees. At no time does the dissent in this case even hint that the majority decided this case

based upon federal law. The dissent never states that the majority erroneously applied the Sixth Amendment. In fact, the dissent is almost entirely devoted to state law. It specifically mentions Section Eleven of the Kentucky Constitution (Petition for Writ, 15a) and states that " [i]t is a maxim of Kentucky law that the courts must be careful to preserve the right of a defendant to be present at every stage of the trial. . . " (Id., 17a) The dissent specifically states that "Kentucky, as well as almost every state in the nation, has a similar provision [to the Sixth Amendment]." (Id., 18a). The dissent did not state that the Kentucky provision was identical to the Sixth Amendment. Furthermore, if the dissenting judge was of the opinion that the majority had incorrectly applied the Sixth Amendment, he would certainly have said so at that point. Contrary to the Petitioner's assertion, it is clear that the dissenting opinion recognized that this case was decided on state constitutional grounds. The whole point of the dissent was that the majority had incorrectly decided this case based upon state law.

II.

KENTUCKY HAS NOW ENACTED A STATUTE OBVIATING THE SITUATION WHICH OCCURRED IN THIS CASE.

Another reason for denying certiorari in this case stems from the fact that the issue in this case was an isolated one which is unlikely to recur in Kentucky or anywhere else. Approximately six months after Respondent's trial, KRS 421.350 became effective in Kentucky. That statute, in Subsection (3), specifically allows, and delineates the procedure for, a child witness' testimony in sex abuse cases ou of the presence of the defendant. The testimony of the child witness is "taken in a roor other than the courtroom and . . . televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding." This statute, therefore, obviates the problem which existed in this case. In all future cases of this sort, the defendant will be able to see the witness and confer with counsel during an examination of the witness.

Kentucky is among the growing number of states which are now utilizing video testimony in sex abuse cases.

The constitutionality of KRS 421.350 has been upheld in the Kentucky Supreme Court. Commonwealth v. Willis, Ky., ___ S.W.2d ___ (No. 85-SC-218-TG, rendered July 3, 1986; 55 L.W. 2069; 33 K.L.S. 9).[2] Contrary to Petitioner's assertions, Willis actually supports Respondent's position. It is very clear that Willis was upheld on state, as well as federal, constitutional grounds. The Kentucky Supreme Court held that the video procedure is permissible, under the Kentucky Constitution, because the defendant has the opportunity to view the witness and participate in the proceedings. The Court held:

> KRS 421.350(3) and (4) does not unduly inhibit the right of cross-examination. The accused still has the right to hear and observe the witness testify and the jury have the opportunity to view the video and evaluate the demeanor and credibility of the witness. 33 K.L.S. 9, 16.

Petitioner attempts to argue that Willis conflicts with the decision in the case at bar. It certainly does not. It is clear what the Kentucky Supreme Court is saying based upon these two cases. The Kentucky Constitution does not permit a minor witness to be examined for competency totally out of the presence of the defendant. The Kentucky Constitution does permit this examination to be done as long as the defendant is able to view the proceedings on television and consult with his attorney.

Because of KRS 421.350, as well as other similar statutes around the country, it is highly unlikely that the situation which occurred in the instant case will recur. This Court should, therefore, not grant certiorari. Historically, this Court does not accept certiorari merely to correct perceived errors committed in lower courts. "This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

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[2] At the time the petition for writ of certiorari was filed, there was a Petition for Rehearing pending. The motion was overruled on October 16, 1986 and the case is now final.

Ross v. Moffitt, 417 U.S. 600, 617 (1974). Even assuming, arguendo, that this case was incorrectly decided, there is no compelling reason for this court to grant review. The advent and popularity of the video procedures make this, in reality, a moot issue. It certainly cannot be said that "the effective administration of criminal justice require[s]" that certiorari be granted. Carbo v. United States, 364 U.S. 611, 612 (1961). The new technology in the courtroom certainly negates "the importance of the question presented" in this case. Harris v. Nelson, 394 U.S. 286, 289 (1969).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

NO. 86-572

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

SERGIO STINCER — RESPONDENT

* * * * *

The Respondent, Sergio Stincer, asks leave to file the attached Response to Petition For a Writ of Certiorari to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of this Court.

The Respondent was permitted to proceed as an indigent by the Supreme Court of Kentucky. Respondent's affidavit in support of this motion is attached.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED ON APPEAL
IN FORMA PAUPERIS

SERGIO STINCER — RESPONDENT

* * * *

I, Sergio Stincer, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the Commonwealth of Kentucky has filed a Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky from an adverse decision by that Court.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. $443/month Commonwealth of Kentucky, LaGrange, Kentucky, 40031

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. N.A.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source, NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. N.A

3. Do you own any cash or checking or savings account? ~~N.A.~~ NO

a. If the answer is yes, state the total value of the items owned. NA

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value. N.A.

5. List the persons who are dependent upon you for support and state your relationship to those persons. Camella Stincer - daughter

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

X Sergio Stincer

Subscribed and sworn to before me by Sergio Stincer on this 16 day of October, 1986.

NOTARY PUBLIC- STATE AT LARGE

My Commission expires April 24, 1989

NO. 86-572

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

AFFIDAVIT PURSUANT TO
SUPREME COURT RULE 28(2)

SERGIO STINCER — RESPONDENT

* * * * *

I, Mark A. Posnansky, being duly sworn according to law, depose and say:

1. I am a member of the Bar of the Supreme Court of the United States.

2. I am counsel for Respondent in the above-styled action.

3. The attached Response to Petition for Writ of Certiorari and Motion to Proceed In Forma Pauperis has been properly addressed to the Clerk of the United States Supreme Court, Washington, D.C. 20543 and was deposited, first-class postage prepaid, at the United States Post Office on High Street, Frankfort, Kentucky 40601 at approximately 3:00 p.m., on November 19, 1986.

4. The aforementioned document was given to the official messenger for the Department of Public Advocacy who advised undersigned counsel that he would deposit same in the United States Post Office at approximately 3:00 p.m. on November 19, 1986. Undersigned counsel was advised by letter from this Court, dated October 31, 1986, that the time for filing the Response to Petition for Writ of Certiorari was extended to November 19, 1986.

Mark A. Posnansky

MARK A. POSNANSKY
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
151 ELKHORN COURT
FRANKFORT, KENTUCKY 40601
(502) 564-5254

COUNSEL FOR RESPONDENT

Subscribed and sworn to before me by Mark Posnansky on this 19th day of November, 1986.

Notary Public

NOTARY PUBLIC
STATE AT LARGE

My Commission expires March 26, 1989

NO. 86-572

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

SERGIO STINCER — RESPONDENT

CERTIFICATE OF SERVICE

* * * * *

I, Mark A. Posnansky, counsel for Respondent, hereby certify that the attached Response to Petition For Writ of Certiorari and Motion For Leave To Proceed In Forma Pauperis were served on Petitioner by hand-delivering a copy of same to Petitioner's counsel, Hon. David L. Armstrong, Attorney General, Capitol Building, Frankfort, Kentucky 40601 on the 19th day of November, 1986.

MARK A. POSNANSKY
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(502) 564-2677

COUNSEL FOR RESPONDENT

REPLY

BRIEF

(2)

No. 86-572

Supreme Court, U.S.
FILED
DEC 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

COMMONWEALTH OF KENTUCKY

Petitioner

versus

SERGIO STINCER

Respondent

REPLY BRIEF FOR PETITIONER

DAVID L. ARMSTRONG
ATTORNEY GENERAL

PENNY R. WARREN
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601-3494

COUNSEL OF RECORD
FOR PETITIONER

December 3, 1986

TABLE OF CONTENTS

		Page
I.	THE DECISION BELOW IS BASED UPON FEDERAL CONSTITUTIONAL LAW AND NOT ANY ADEQUATE AND INDEPENDENT STATE GROUND.....	1 - 5
A.	The Supreme Court of Kentucky Construed The Confrontation Clause Of The Federal And State Constitutions In The Same Manner.....	1 - 3
B.	The Supreme Court of Kentucky Decided A Federal Question In Conflict With Other State Courts Of Last Resort And With A Federal Court of Appeals.....	3 - 5
C.	Harmless Error Analysis Is Relevant	5
II.	THE PROBLEM IN STINCER WILL ARISE AGAIN FREQUENTLY IN KENTUCKY AND OTHER STATES.....	5 - 13
CONCLUSION.....		14

TABLE OF AUTHORITIES

	Page
CASES:	
Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986).....	3, 5, 6, 8, 9
Hochheiser v. Superior Court, 161 Cal.App.3d 777, 208 Cal.Rptr. 273 (1984).....	10
Moll v. State, 351 N.W.2d 639 (Minn.App. 1984).....	4
Ohio v. Roberts, 448 U.S. 56 (1980).....	8
People v. Breitweiser, 349 N.E.2d 454 (Ill.App. 1976).....	4
Powell v. State, 694 S.W.2d 416 (Tex.Ct.App. 1985).....	10
State v. Richey, 490 P.2d 558 (Ariz. 1971).....	4
State v. Sheppard, 484 A.2d 1330, 1333 (N.J.Super. 1984).....	12
State v. Taylor, 704 P.2d 443 (N.M.App. 1985).....	4
State v. Warford, 389 N.W.2d 575, 582 (Neb. 1986).....	4
Stincer v. Commonwealth 715 S.W.2d 939, 940 (Ky. 1986).....	2-3, 4

TABLE OF AUTHORITIES
(Continued)

	Page
CASES (cont.):	
United States v. Ashe, 478 F.2d 661, 666 (D.C.Cir. 1973).....	4
United States v. Benfield, 593 F.2d 815 (8th Cir. 1979).....	10
STATUTES:	
1985 Ala. Acts, No. 85-743.....	11
Alaska Stat. Sec. 12.45.047 (1984).....	11
Ariz. Rev. Stat. Ann. Sec. 13-4253 (1985).....	10
Ark. Stat. Ann. Secs. 43-2035-2037 (1985).....	11
Cal. Penal Code Sec. 1346 (West 1985)..	11
Colo. Rev. Stat. Sec. 18-3-413 (1984)..	11
Conn. Pub. Act. No. 85-587, Conn. Legis. Serv. 463 (West).....	10
Del. Code Ann. tit. 11, Sec. 3511 (1985).....	11
Fla. Stat. Sec. 92.53 (1985).....	11
Iowa Code Sec. 910A.3 (1985).....	11
Kan. Sess. Laws 1985, Ch. 112.....	10
Ky. Rev. Stat. 23A.010.....	6

TABLE OF AUTHORITIES
(Continued)

Page

STATUTES (cont.):

Ky. Rev. Stat. 24A.110..... 6

Ky. Rev. Stat. 421.350 (1984)..... 10

Me. Rev. Stat. Ann. tit. 22, Sec. 1205 (1985)..... 11

Mass. Gen. Laws Ann. ch. 278, Sec. 16D (West 1985)..... 11

Mo. Ann. Stat. Secs. 491.680 - 491.687 (Vernon 1985)..... 11

Mont. Code Ann., Secs. 46-15-401 to 403 (1977)..... 11

Nev. Stat. 1985, Ch. 462..... 10

N.H. Stat. Ann. Sec. 517:13-a (1985)... 11

N.M. Stat. Ann. Sec. 30-9-17 (1984).... 11

Okla. Stat. Ann., tit. 27, Sec. 753 (West 1984)..... 10

R.I. Gen. Laws Sec. 11-37-13.1 (1985).. 10

S.D. Codified Laws Ann. Sec. 23A-12-9 (1985)..... 11

Tenn. Code Ann. Sec. 24-7-116 (1985)... 11

Texas Code Crim. Proc. Ann., art. 38.071 (Vernon 1983)..... 10

TABLE OF AUTHORITIES
(Continued)

	Page
STATUTES (cont.):	
Utah Code Ann. Sec. 77-35-15.5 (1985)..	11
Vt. R. Evid. 807 (1985).....	11
TEXTS:	
98 Harv.L.R. 806, 810 (February, 1985).	8
69 Minn. L. Rev. 1377, 1388, 1398 (1985).....	4
Papers From A National Policy Conference On Legal Reforms In Child Sexual Abuse Cases (ABA 1985), pp. 280-281.....	7-8, 12
Protecting Child Victim Witnesses: Sample Laws and Materials, (ABA, February, 1986), pp. 22-24.....	8, 9, 10
40 U. of Miami L. R. 245, 246 (1985)...	12

I. THE DECISION BELOW IS BASED UPON FEDERAL CONSTITUTIONAL LAW AND NOT ANY ADEQUATE AND INDEPENDENT STATE GROUND.

Kentucky addressed the jurisdiction of this Court on pages 19-23 of its petition. Respondent essentially ignores that analysis, insists that the Supreme Court of Kentucky is construing its own Constitution more restrictively than the United States Constitution, and raises for the first time other arguments on this issue in its Brief in Opposition. Kentucky will first reply to the claim that the decision is based on state, and not federal, constitutional analysis and then briefly reply to the contention that, accordingly, there are no conflicts with decisions of this Court or other states' highest courts or a federal court of appeals.

A. The Supreme Court of Kentucky Construed The Confrontation Clause Of The Federal And State Constitutions In The Same Manner.

Respondent boldly asserts, "It could not be more clear from the language of the Court's opinion that this decision was based on state

law." (Br.Opp., p. 1.) He continues, "It can immediately be seen that this state constitutional guarantee goes further than the applicable federal constitutional provision." (Br.Opp., p. 3.)

Kentucky notes first that its Supreme Court was not presented with alternative state grounds for its decision. In his Brief for Appellant (pages 14-17) and Reply Brief (pages 2-3), respondent never mentioned the Kentucky Constitution. Instead, he claimed denial of "due process of his Sixth Amendment right to confront the witnesses against him" (Brief for Appellant, p. 14) and "due process and his Sixth Amendment right to confront his accusers" (Id., p. 17).

The decision below does not reflect any consideration of an alternative state ground. Instead, the majority opinion expressly refers to the Sixth Amendment and Section Eleven conjunctively.

> ". . . that he was denied his right to confrontation, under the Sixth Amendment

of the United States Constitution and Section Eleven of the Kentucky Constitution. . . ." (Emphasis added.) 712 S.W.2d at 940; Petition Appendix, p. 1a.

"The main purpose of the confrontation rule, under both the Sixth Amendment and Kentucky's Bill of Rights, is to ensure the defendant's right to cross-examine the witnesses against him at trial." (Emphasis added.) 712 S.W.2d at 940; Petition Appendix, p. 3a.

A few weeks after the Stincer decision, the Supreme Court of Kentucky did consider and expressly rejected a claim that Kentucky's confrontation clause should be construed more stringently than the federal constitution. Commonwealth v. Willis, 716 S.W.2d 224, 229 (Ky. 1986).

Respondent's claim that the Supreme Court of Kentucky was construing only state law is squarely refuted by these decisions.

B. The Supreme Court of Kentucky Decided A Federal Question In Conflict With Other State Courts Of Last Resort And With A Federal Court Of Appeals.

Respondent argues there is no conflict because the Kentucky decision is based only on state law.

As shown above, Kentucky interpreted the Sixth Amendment as guaranteeing a right to be present at a pretrial competency hearing. 712 S.W.2d at 940, 941. The highest court of Nebraska agrees. State v. Warford, 389 N.W.2d 575, 582 (Neb. 1986). A federal court of appeals has similarly construed the Sixth Amendment. United States v. Ashe, 478 F.2d 661, 666 (D.C.Cir. 1973). In direct conflict are the decisions of Arizona's highest court and three intermediate state courts.[1/] One commentator states the Minnesota intermediate court decision on this issue is in conflict with a decision of its highest court, leaving the issue "unsettled."[2/]

1/ State v. Richey, 490 P.2d 558 (Ariz. 1971); State v. Taylor, 704 P.2d 443 (N.M.App. 1985); Moll v. State, 351 N.W.2d 639 (Minn.App. 1984); People v. Breitweiser, 349 N.E.2d 454 (Ill.App. 1976).

2/ Comment, "Minnesota Developments: Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases," 69 Minn.L.Rev. 1377, 1388, 1398 (1985).

The conflicts and the need for guidance from this Court on this important issue are clear.

C. Harmless Error Analysis Is Relevant.

Respondent attempts to denigrate the clear conflict with this Court's decisions on harmless error by repeating his assertion that the Stincer decision is based on state law. The "state law" claim is refuted in Part A above. Respondent does not address the issue further, thereby conceding the conflict unless his "state law" argument is accepted.

II. THE PROBLEM IN STINCER WILL ARISE AGAIN FREQUENTLY IN KENTUCKY AND OTHER STATES.

The Supreme Court of Kentucky remanded the Stincer case for retrial, holding he was denied his constitutional right to be present at a pretrial competency hearing for the child sexual abuse victims. In Commonwealth v. Willis, 716 S.W.2d 224 (Ky., 1986), a four-year-old girl, who allegedly had been sexually abused by her babysitter's husband, was so intimidated by the defendant's presence at her pretrial competency

hearing that she could not or would not respond to the trial judge's questions. Kentucky's highest court held her testimony could be taken by a videotape arrangement such that the defendant could see and hear the victim but she would not see and hear him. In Stincer's Brief in Opposition he raises for the first time the contention that the Willis decision obviates the problem of constitutional error in Stincer. He argues the issue is unlikely to recur in Kentucky or in other jurisdictions. Kentucky strongly disagrees.

First, from a practical standpoint, equipment necessary for a constitutionally acceptable videotape deposition is simply not available throughout Kentucky, much less in other states. Kentucky has a long-range plan to install video equipment in its circuit courtrooms;[3/] but at

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3/ In Kentucky, Circuit Courts have jurisdiction in felony cases; District Courts have jurisdiction in misdemeanor cases. Kentucky Revised Statutes (KRS) 23A.010, 24A.110.

present, equipment is available in only sixteen of ninety-one circuit court divisions.[4/] There are no plans to install video equipment in district courtrooms.[5/] The expense of acquisition and installation of video equipment is a serious hurdle in implementation of any videotaping procedure.[6/] "In many local jurisdictions these costs may be prohibitive unless there is a large number of sexually victimized children."[7/] Additional major practical hurdles include training of competent operators and interviewers, logistical availability of personnel and equipment when needed,

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4/ Telephone interview with Don Cetrulo, Director, Kentucky Administrative Office of the Courts, November 24, 1986.

5/ Id.

6/ Lloyd, David W., "Practical Issues in Avoiding Confrontation of a Child Witness and the Defendant in a Criminal Trial," Papers From A National Policy Conference On Legal Reforms In Child Sexual Abuse Cases, (ABA 1985), pp. 280-281.

7/ Id. at 281.

cooperation of the child victim, and the potentially nonpersuasive impact of the videotape on the fact finder.[8/]

Legal issues surrounding the use of videotape statutes present even higher barriers to implementation. In Kentucky, the prosecution must demonstrate a reasonable necessity for use of the procedure. Willis, supra, at 227, 229-230. Commentators argue that the Ohio v. Roberts, 448 U.S. 56 (1980), standard of unavailability and reliability must be met.[9/] The Kentucky videotape statute provides the "testimony" of the child may be taken. Kentucky

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8/ Id. at 280-282.

9/ Eatman and Bulkley, Protecting Child Victim Witnesses: Sample Laws and Materials, (ABA, February, 1986), pp. 22-24. Graham, Michael H., "Child Sex Abuse Prosecutions: Hearsay and Confrontation Clause Issues," Papers, supra, n. 4, pp. 190-195. Note: "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations," 98 Harv.L.R. 806, 810 (February, 1985). But see: Willis, supra.

has interpreted this language to include a pre-trial inquiry into competency. Willis, supra. Other jurisdictions likely would construe the term "testimony" to mean evidence at trial and not the preliminary assessment by a court of the child's competency.

A proposed sample statute requires expert testimony to support a finding of unavailability.[10/] Requiring a child victim to undergo a psychiatric or psychological examination in order to avoid the trauma of an abuser's presence at a competency hearing does not "obviate the problem" in such cases. Even if it did, there are only eight states which clearly authorize screening the victim from the sight and sound of the defendant during a video

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10/ Id., 19, 23.

deposition.[11] Of these, only Kentucky has upheld the constitutionality of its statute. An intermediate court in Texas, ruling on an identical sttute, has declared it unconstitutional. Powell v. State, 694 S.W.2d 416 (Tex.Ct.App. 1985).[12] Similar procedures, not statutorily authorized at the time, have been held to violate the right of confrontation. United States v. Benfield, 593 F.2d 815 (8th Cir. 1979); Hochheiser v. Superior Court, 161 Cal.App.3d 777, 208 Cal. Rptr. 273 (1984). Eight other states' videotape statutes expressly

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11/ Eatman and Bulkley, supra, n. 7, pp. 31-36. Ariz. Rev. Stat. Ann. Sec. 13-4253 (1985); Conn. Pub. Act. No. 85-587, Conn. Legis. Serv. 463 (West); Kan. Sess. Laws 1985, Ch. 112; Ky. Rev. Stat. 421.350 (1984); Nev. Stat. 1985, Ch. 462; Okla. Stat. Ann., tit. 27, Sec. 753 (West 1984); R.I. Gen. Laws Sec. 11-37-13.1 (1985); Texas Code Crim. Proc. Ann., art. 38.071 (Vernon 1983).

12/ The Texas highest court granted review in Powell, but no decision has been rendered to date.

require the presence of the defendant.[13] A third group of states provide the defendant may be excluded,[14] or make no reference to the presence of the defendant.[15] These states no doubt are awaiting court decisions on the Confrontation Clause issue.

Even if all Confrontation Clause issues were resolved in the state's favor, videotape statutes still face constitutional challenges in the areas

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13/ 1985 Ala. Acts, No. 85-743; Alaska Stat. Sec. 12.45.047 (1984); Ark. Stat. Ann. Secs. 43-2035 to 2037 (1985); Mont. Code Ann., Secs. 46-15-401 to 403 (1977); N.H. Stat. Ann. Sec. 517:13-a (1985); N.M. Stat. Ann. Sec. 30-9-17 (1984); Tenn.Code Ann. Sec. 24-7-116 (1985); Vt. R. Evid. 807 (1985).

14/ Id. Del. Code Ann. tit. 11, Sec. 3511 (1985); Fla. Stat. Sec. 92.53 (1985); Iowa Code Sec. 910A.3 (1985); Utah Code Ann. Sec. 77-35-15.5 (1985).

15/ Id. Cal. Penal Code Sec. 1346 (West 1985); Colo. Rev. Stat. Sec. 18-3-413 (1984); Me. Rev. Stat. Ann. tit. 22, Sec. 1205 (1985); Mass. Gen. Laws Ann. ch. 278, Sec. 16D (West 1985); Mo. Ann. Stat. Secs. 491.680 to 491.687 (Vernon 1985); S.D. Codified Laws Ann. Sec. 23A-12-9 (1985).

of free press, public trials, and presumption of innocence.[16]/

The significant conflicts among the interests of the state, the defendant and the victim come into sharpest focus in child sexual abuse cases. The only eyewitness is usually a child of tender years who has been betrayed by a powerful, trusted adult. Asking such a witness to understand, not be afraid, and respond in a courtroom as a mature adult is asking too much in most cases. For this reason, many charges will never be prosecuted. See, for example, State v. Sheppard, 484 A.2d 1330, 1333 (N.J.Super. 1984). In the words of one angry parent: "That's like saying, 'Ok pervert, go out and molest very young kids because if they're young enough, they're out of luck.'"[17]/

16/ Graham, supra, n. 7, pp. 186, 194.

17/ Comment, "The Competency Requirement For the Child Victim of Sexual Abuse: Must We Abandon It?" 40 U. of Miami L.R. 245, 246 (1985).

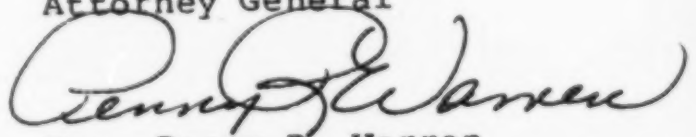
Clearly, a video deposition statute is not the panacea respondent would have this Court believe. It is but a tool available for a limited number of cases. With the practical problems and legal controversy surrounding video depositions at present, it will be many years before this tool is available on a widespread basis. Thus, the confrontation issue in Stincer and the chilling effect of intimidation of a child victim by a defendant's presence at a competency hearing will recur frequently in Kentucky and in other jurisdictions. Until this Court corrects the erroneous conclusion in Kentucky and other states that the Confrontation Clause of the Sixth Amendment requires the presence of a criminal defendant at a preliminary competency hearing, law enforcement in the unique and sensitive area of child sexual abuse will be seriously hampered.

CONCLUSION

Kentucky urges this Court to strike the proper balance among the interests of the defendant, the state and the victim by granting certiorari or by summarily reversing the decision of the Supreme Court of Kentucky.

The Commonwealth of Kentucky
Petitioner

David L. Armstrong
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By: Penny R. Warren
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JOINT

APPENDIX

FILED
JAN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-572

SUPREME COURT OF THE UNITED STATES

October Term, 1986

COMMONWEALTH OF KENTUCKY - - Petitioner

versus

SERGIO STINCER - - - - - Respondent

On Writ of Certiorari to the Supreme Court of Kentucky

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 6, 1986
CERTIORARI GRANTED DECEMBER 8, 1986

WESTERFIELD-SONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

95PP

INDEX

ITEM	PAGE
Chronological List of Relevant Docket Entries	ii
Transcript of Record	
—Indictment	iii
—Judgment	v
Transcript of Trial	
—In Chambers Competency Hearing	1–11
—Trial Testimony of Tyronda Marie Griffin:	
Direct Examination by Mr. Rogers	11–16
Cross Examination by Mr. Embry	17–39
Redirect Examination by Mr. Rogers	34–41
—Trial Testimony of Pauline Nicole Griffin:	
Direct Examination by Mr. Rogers	41–45
Cross Examination by Mr. Embry	45–58
—Recall of Pauline Nicole Griffin	
Direct Examination by Mr. Rogers	58–59
—Trial Testimony of Sergio Stincer	
Direct Examination by Mr. Embry	59–66
In Chambers Hearing	66–67
—Trial Testimony of Sergio Stincer Continued	
Cross Examination by Mr. Rogers	67–79
Redirect Examination by Mr. Embry	79–80
Opinion of the Supreme Court of Kentucky	81–91
Order of the Supreme Court of the United States Granting Petition for Certiorari	92

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Docket Item
10/28/83	Sergio Stincer (respondent) was arrested pursuant to a Christian District Court warrant charging Sodomy First Degree—3 counts, KRS 510.070.
12/16/83	Respondent was indicted by the Christian County Grand Jury for three separate offenses of First Degree Sodomy involving three children.
2/ 3/84	Respondent was tried in Christian Circuit Court by a jury on all principal charges in the indictment except one count of sodomy which was dismissed prior to trial. Jury found respondent guilty on two counts and set sentence at 20 years.
3/16/84	Final Judgment entered in the Christian Circuit Court, which judgment imposed a sentence in accord with jury's verdict.
3/26/84	Respondent filed Notice of Appeal to the Supreme Court of Kentucky.
6/12/86	The Supreme Court of Kentucky rendered its opinion reversing respondent's conviction and remanding the case for retrial.
8/ 7/86	The Supreme Court of Kentucky denied Kentucky's petition for rehearing.

[6]

TRANSCRIPT OF RECORD

INDICTMENT

CHRISTIAN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY

v.

SERGIO STINCER

Indictment No. 83-CR-219

KRS 510.070 First Degree Sodomy (3 Cts.)
(Class A Felony)

The Grand Jury charges:

On or about the 14th day of October, 1983, in Christian County, Kentucky, the above named defendant(s) committed three separate offense of first-degree Sodomy by having deviate sexual intercourse with three children incapable of consent, eight year old Tyronda Marie Griffin, seven year old Pauline Nicole Griffin and five year old Bruce Handy, Jr.;

against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL

(s) ? ? ? ? ? ?
Foreman

Bail $[? , ?] Jail

Presented by the Foreman of the Grand Jury to said court in the presence of the entire Grand Jury and received from the Court by me and filed on open court this 16th day of December, 1983.

(s) Jack Haddock, Clerk
By (s) Kathleen G. Restau, Deputy Clerk

WITNESSES

Beverly Smith, Dept. of Human Resources, 886-5291

Marie Griffin

[27]

JUDGMENT AND SENTENCE
(Jury Trial)

CHRISTIAN CIRCUIT COURT

Indictment No. 83-CR-219
First Degree Sodomy

Hopkinsville, Ky., Date: March 16, 1984

COMMONWEALTH OF KENTUCKY, - - - *Plaintiff,*

v.

SERGIO STINCER, - - - - - - - *Defendant.*

The defendant was this day brought into Court, and after having seen his presentence report, was asked if he had any legal cause to show why judgment should not be pronounced against him. Upon advise of counsel, Joel R. Embry, III, who was present at sentencing, none being shown, it is adjudged that the defendant, being 27 years of age, be taken by the Sheriff of Christian County, to the jail of Christian County and from there by the Sheriff of said county transferred to the custody of the Department of Corrections and to remain in their custody for a period of Twenty (20) years. The Sheriff of said county shall transfer the defendant to the Department of Corrections at such location as the Department designate. PROBATION DENIED. DEFENDANT TO RECEIVED CREDIT FOR 140 DAYS JAIL TIME, EXCLUDING MARCH 16, 1984.

(If this sentence is to run concurrently or consecutively with any other sentence, complete the following)

This sentence to run N/A with
(consecutively/concurrently)
the sentence on Indictment No. _____, of the _____ Circuit Court.

(s) Edwin M. White, Judge
Christian Circuit Court, Division 1

I, Jack Haddock, Clerk of the Christian Circuit Court, do hereby certify that the foregoing judgment is a true and correct copy of the judgment in the above styled case, entered on March 16, 1984.

Witness my hand as Clerk of the Christian Circuit Court, this the 16th day of March, 1984.

Jack Haddock
Circuit Court Clerk

By (s) Kathleen G. Restau, D.C.

CHRISTIAN CIRCUIT COURT

Indictment No. 83-CR-219

COMMONWEALTH OF KENTUCKY, - - - *Plaintiff,*

v.

SERGIO STINCER, - - - - - - - *Defendant.*

TRANSCRIPT OF TESTIMONY
February 3, 1984

• • • • • • • •

[14]
IN CHAMBERS HEARING

Mr. Rogers: He has told me that if you consider this exculpatory that—.

The Court: Let's—we've got witnesses right there. Take them into the hall or close the door.

Mr. Rogers: If this can be considered exculpatory Bruce Handy, Jr., told me that Sergio put a sock over his eyes and put pudding in his mouth but he did not put his d-i-c-k in his mouth.

Mr. Embry: He's made no mention of what happened to the other children.

Mr. Rogers: No. He did not see whatever happened to the other children.

Mr. Embry: Judge, I have no objection to it being dismissed.

The Court: Show that the count or that portion of the Indictment is dismissed as to Bruce Handy, Jr. Now, what other matters do we need to take up?

Mr. Rogers: We're dealing here with seven and eight-year-old children and I think as a preliminary matter maybe the Court should inquire of them to determine whether or not you believe that they're competent to testify. Of course,

that would still be up to the jury to determine, I understand, but I think you do have to make a preliminary decision.

The Court: Okay. Let's bring them in one at a time. I think we need to get Mr. Stincer back in the courtroom while we're interviewing these children in chambers.

[15]

Mr. Embry: We don't have any problem with that, Judge. Sergio, we're going to talk to the children, not about the case really but just to see if they're old enough to understand the difference between telling a lie and telling the truth, that sort of thing and I think they'll have you set outside. I will tell you what happens in a little bit.

Mr. Stincer: (phonetic)

Mr. Embry: I guess what he's saying is, Judge, he wishes to be here. Of course, I think you'd probably have the right to handle it.

The Court: I think they're going to have to be interviewed with counsel present only. I think I can exclude everyone.

Mr. Embry: Right, Judge. I just—

The Court: I'll let counsel be present.

Mr. Embry: To protect my client, I'll ask that he be allowed to stay.

The Court: Fine. Overruled. Let's bring one of them in.

Mr. Rogers: Tyronda, you have a seat right here. Tyronda, this is Mr. White, Judge White, the man with the black robe on.

The Court: Hi, Tyronda.

Tyronda: Hi.

The Court: How old are you?

Tyronda: Eight.

The Court: Eight years old?

[16]

Tyronda: Me and Kathy got the same birthday.

The Court: You and who?

Tyronda: Kathy.

The Court: Kathy Ghigliotty?

Tyronda: Uh-huh.

The Court: Kathy out there? Well I'll be. When's your birthday?

Tyronda: July 27.

The Court: You don't forget that, do you? Do you go to school?

Tyronda: My uncle give me some money for that. Every time he gave me some money. He gave me a watch.

The Court: On your birthday? Do you go to school?

Tyronda: Uh-huh.

The Court: Where do you go to school?

Tyronda: Indian Hills.

The Court: Indian Hills. Who's your teacher?

Tyronda: Mrs. Williams. I've got two teachers.

The Court: Who's your other teacher?

Tyronda: Mrs. Simpson.

The Court: And how old are you?

Tyronda: Eight.

The Court: Do you go to Sunday School?

Tyronda: Yes ma'am. Yes sir.

The Court: Where do you go to Sunday School?

[17]

Tyronda: First Baptist Church in Avalon.

The Court: Do you like Sunday School?

Tyronda: Uh-huh.

The Court: Do you know what it means to tell the truth?

Tyronda: Uh-huh.

The Court: What do you think that means?

Tyronda: You mean about God?

The Court: Huh?

Tyronda: You mean about God?

The Court: No. What do you think it means to tell the truth?

Tyrona: Don't tell no stories.

The Court: Well, do you know the difference between telling a lie and telling the truth?

Tyronda: Uh-huh.

The Court: What's the difference?

Tyronda: Don't tell no stories.

The Court: If we ask you to make a promise—

Tyronda: I promise.

The Court: —to God—

Tyronda: To God.

The Court: —that you will tell the truth and answer the questions that are asked of you. Can you do that?

Tyronda: Yes sir.

The Court: And you wouldn't tell us any fibs or any stories?

[18]

Tyronda: No sir.

The Court: All right, y'all want to ask?

Mr. Rogers: I think you've covered it, Judge.

Mr. Embry: I've got one or two questions, Judge.

The Court: All right.

Mr. Embry: Tyronda?

The Court: Tyronda.

Mr. Embry: Tyronda, what does it mean to you to tell a story. What does that mean to you?

(No answer)

Mr. Embry: You don't know what telling a story means?

(No answer)

Mr. Embry: Do you know what telling a lie means?

Tyronda: Don't tell stories.

Mr. Embry: Okay. You say don't tell no story, but what's telling a story to you? What does that mean?

(No answer)

Mr. Embry: Do you understand what I'm saying? I asked you what is a lie and your answer was—you said, Tyronda, don't tell no story, right? That's what you just said. Okay, well, what I'm asking you is, Tyronda, what's don't tell no story? What does telling a story mean to you?

The Court: What would you do if you told a story? Can you tell us that?

Tyronda: Get in trouble.

[19]

The Court: Okay. That's an answer to the question. It's not the answer we're looking for. Let's try it another way. Why would you get in trouble?

Tyronda: For telling a story.

The Court: Okay. The dog is chasing the tail.

Mr. Rogers: That's a pretty good answer.

The Court: Well, it is. Why would you get in trouble if you told a story?

Tyronda: Get punished.

The Court: Why would you get punished?

Tyronda: For telling a story.

Mr. Rogers: Let me ask you this. Is it right or is it wrong to tell a story?

Tyronda: Wrong. My mom says I talk too fast.

The Court: You're doing fine. You're doing real good as a matter of fact.

Mr. Embry: I can't think of another way to put it to be honest with you Judge.

Tyronda: I'm not scared no more.

The Court: You're not what?

Tyronda: Scared no more. Me and my sister was scared.

The Court: Why were you scared?

Tyronda: About who would go up there and stuff, we was scared.

The Court: Well, we don't scare you, do we? Mr. Embry or

[20]

Mr. Rogers or myself?

(Tyronda nods head negatively)

The Court: Good, we don't want to.

Mr. Rogers: Your Honor, I move that this witness is qualified.

The Court: The only thing other that we can do is maybe get into some of the specifics but I think it's a little premature. I think she understands the difference between the truth and a lie and I think that's the issue before us. I think she's competent in that regard. Thank you for coming in. Will you go back out and sit with Kathy?

The Court: (to Nicole) Hi, Nicole, will you sit down with us for a minute. We're glad you could join us today. We need to talk to you for a minute. Will you talk to us? When we ask you something will you answer us? Can you do that? How old are you, Nicole?

Nicole: Seven.

The Court: Seven years old? Are you in school?

(Nicole nods head affirmatively)

The Court: Where do you go to school?

Nicole: Indian Hills.

The Court: And who's your teacher?

Nicole: Mrs. Wilson.

The Court: Do you like school?

Nicole: Uh-huh.

[21]

The Court: What's your favorite subject other than recess? Do you like reading or do you like math or science?

Nicole: Reading.

The Court: Do you go to Sunday School?

Nicole: Yes.

The Court: Nicole, if I asked you a question, will you give me an answer that is the truth? Do you know what the truth means? What do you think it means to tell the truth? Do you know?

(Nicole nods negatively)

The Court: If your mama tells you to tell me the truth, what is she asking you to do?

Nicole: She's asking me to tell the truth.

The Court: What does that mean?

Nicole: That means you love God.

The Court: It means what?

Nicole: You love God.

The Court: Well, that's certainly the truth. Do you know what it is to tell a lie or a fib?

Nicole: Yeah, I know it.

The Court: What is that?

Nicole: When you tell a lie God get angry.

The Court: Why would he get angry?

Nicole: 'Cause.

The Court: 'Cause why?

Nicole: 'Cause you tell lies.

[22]

The Court: Do you know what the difference between a lie and the truth is?

(Nicole nods negatively)

The Court: You don't? If we asked you a question, would you tell us the truth?

(Nicole nods affirmatively)

The Court: Then you wouldn't tell us a lie? Is that what you are saying?

(Nicole nods affirmatively)

The Court: I don't know about this one.

Mr. Rogers: Nicole, if you told a lie would that be right or would it be wrong?

Nicole: Wrong.

Mr. Rogers: And why would it be wrong?

Nicole: Because you told a lie.

The Court: What is a lie? Is a lie the truth?

(Nicole nods negatively)

The Court: Do you know why it isn't the truth? You're doing fine, Nicole. We're just talking. You're doing good.

Mr. Rogers: Nicole, where do you go to Sunday School?

Nicole: Avalon.

Mr. Rogers: And do you go every Sunday?

(Nicole nods affirmatively)

Mr. Rogers: What do you learn there?

Nicole: About God.

[23]

The Court: Do you learn about Jesus?

Nicole: Yes.

Mr. Rogers: Where does Jesus live?

Nicole: In heaven.

Mr. Rogers: Anywhere else?

Nicole: No.

Mr. Rogers: I don't have any other questions.

The Court: Mr. Embry.

Mr. Embry: Nicole, do you know why you shouldn't tell a lie?

(Nicole nods negatively)

Mr. Embry: You don't know why you shouldn't? You don't know the difference between what's a lie and what's the truth? Do you know the difference?

The Court: Now, think about that. Do you know the difference when you tell a lie and when you tell the truth? Nicole, huh? Well, if you were in school in your class and you were talking and Mrs. Wilson asked everybody in the class to raise their hand that was talking or ask you—if Mrs. Wilson asked you, Nicole, were you talking, if you told her no what would that be?

Nicole: A lie.

The Court: If you told her yes what would that be?

Nicole: The truth.

The Court: Do you know what the difference between telling a lie and telling the truth is?

(Nicole nods affirmatively)

[24]

The Court: If later today we asked you some questions, can you promise that you will tell us the truth and not tell us a lie?

(Nicole nods affirmatively)

The Court: You can?

(Nicole nods affirmatively)

The Court: Nodding head yes.

Mr. Rogers: Nicole, would you get in trouble if you told a lie?

Nicole: Uh-huh.

Mr. Rogers: Do you know what would happen?

Nicole: A lot of trouble.

Mr. Rogers: Do you know what would happen to you?

Nicole: Yeah.

Mr. Rogers: What would happen.

Nicole: You'd get a whopping.

Mr. Rogers: Would God be angry at you?

Nicole: Yeah.

The Court: Well, only one other thing I know to try and I think we need to do it with this one. Nicole, has anybody told you what to say today? Has anybody talked to you and told you what you're to say?

(Nicole nods affirmatively)

The Court: They have? Who's told you what to say?

Nicole: Him.

[25]

Mr. Rogers: Let the record show she's pointing at the prosecutor.

The Court: The truth is out finally.

Mr. Rogers: She can't tell a lie, Judge.

The Court: That's a good girl. That's good. Now, anything that you tell us today will be—why would you tell us—if he asked you a question, will you answer what he told you to say or what you know to be the truth?

Nicole: Know to be the truth.

The Court: That's a girl. He just talked to you about what was going to happen today, didn't he, uh? He hadn't told you what to say, has he, he just told you how to say it, didn't he? Huh? Is that right?

(Nicole nods affirmatively)

Mr. Rogers: Nicole, let me ask you one thing. Did you just meet me this morning?

(Nicole nods affirmatively)

The Court: Unless we get into specifics—I think it's somewhat close. We may need a child psychologist to ask

the right question. I think she has done very well. Any other questions either one of you want to ask? I'm prepared to rule that she is competent.

Mr. Embry: I can't think of any, Judge. I really agree with you. I think it appears from what we've done so far that she probably would be competent.

[31]

TRIAL TESTIMONY IN OPEN COURT

Testimony For The Commonwealth

TYRONDA MARIE GRIFFIN: After being first duly sworn, testified as follows:

Direct Examination by Mr. Rogers:

Q. Could you tell us your name?

A. Tyronda.

Q. And what's your last name, Tyronda?

A. Griffin.

Q. Tyronda, how old are you?

A. Eight.

Q. Do you go to school somewhere?

A. Uh-huh.

Q. Where do you go to school?

A. Indian Hills.

Q. Is that in Hopkinsville?

A. Uh-huh.

Q. What grade are you in, Tyronda?

A. Second.

Q. What's your teacher's name?

A. Mrs. Wilson and Mrs. Simpson.

Q. How long have you been going to Indian Hills school?

A. I don't know.

The Court: We have to stop there, just for your information.

[32]

Either side can request that any witness who wants to testify in a particular trial, that all witnesses be excluded while that witness is testifying. Once either side asks for the rule, the rule is invoked. This is why we stopped there. If a witness stays in this room or hears testimony, we can rule that they not be allowed to testify. That rule has been invoked and that's why we had to stop. Mr. Rogers.

Q. Tyronda, do you know where you live?

A. Route 2.

Q. What is your mother's name?

A. Marie.

Q. Do you know Sergio Stincer?

A. Yeah.

Q. Is he in the courtroom here today?

A. (Witness makes motion that she doesn't know)

Q. Can you stand up and look around and see if you see him?

A. Yeah.

Q. Where is he?

A. Over there.

Mr. Rogers: Let the record show that she is pointing to defense counsel table.

The Court: What is he wearing?

A. A red jacket.

The Court: Show that she has identified Sergio Stincer.

Q. How long have you known Sergio?

[33]

A. I don't know.

Q. Well, have you known him over a year?

A. Yes.

Q. Have you known him less than a year?

A. I don't know.

Q. Do you remember when Sergio had a birthday?

A. Yeah.

Q. Do you remember what that date is?

A. Yes.

Q. What was the date?

A. The birthday?

Q. Yes. Do you remember when his birthday was, what the date is?

A. On a Friday.

Q. Do you remember what month it was in?

A. No.

Q. When is your birthday?

A. July 27.

Q. Do you go to Sunday School anywhere?

A. Yes.

Q. Where do you go to Sunday School?

A. At Avalon

Q. Do you know what it means to tell the truth?

A. Yes. Don't tell a story.

Q. Would you get in trouble if you told a story?

A. Yes.

[34]

Q. What kind of trouble would you get in?

A. A whopping.

Q. Would God be angry at you?

A. Yes.

Q. Do you remember Sergio playing a game and doing something to you?

A. Yes.

Q. Can you tell us what he did?

A. Yes.

Q. Talk slow enough so we can understand you.

A. He came and got me and said Marie come here. Then he put a sock around me.

Q. Wait a minute. Where did he put the sock?

A. Around my eyes.

Q. Could you see out?

A. Yeah.

Q. You could see?

A. Uh-huh. It was a very dark sock.

Q. After he put the stocking on your eyes, could you see?

A. Uh-huh.

Q. Then what did he do?

A. Put some pudding in my mouth.

Q. Pudding. What else did he do?

A. And then he put his d-i-c-k.

Q. His d-i-c-k?

A. Uh-huh.

[35]

Q. And what is that? Is that something that he keeps in his pants?

A. Uh-huh.

Q. Did he have his pants on?

A. Uh-huh.

Q. What did he have on?

A. Shorts.

Q. Underwear shorts?

A. Uh-huh. He had plain shorts.

Q. Did he pull his shorts down?

A. Yes.

Q. Is his d-i-c-k something that's private?

A. Yeah.

Q. Is it something that normally you don't see?

A. Uh-huh.

Q. Do you know what a penis is?

A. Uh-huh.

Q. Do you know what a d-i-c-k is?

A. Uh-huh.

Q. Do you have one?

A. Uh-uh.

Q. How long did he keep his d-i-c-k in your mouth?

A. Three minutes and then he came and got my sister.

Q. And then he went and got your sister?

A. Uh-huh.

Q. Who else was there at the house?

[36]

A. Sharika and Earl and my other sister and Sharika's other sister. My momma and Mary was gone.

Q. Okay. Who is Mary?

A. My aunt who is setting over there.

Q. Were you all living together?

A. Uh-uh. I was living in Cherokee Park.

Q. You just happened to be over there at Mary's house?

A. No, Sometimes I go over there to play with her little girl.

Q. You were visiting there?

A. Uh-huh.

Q. And Sergio was going to have a birthday that day?

A. Uh-huh.

Q. Why was your mother and your aunt gone?

A. Gone to get the present and going to get some balloons for us and got the birthday cake and stuff.

Q. For Sergio.

A. Uh-huh. Mary, and my momma went with her.

Q. When they came home did you tell them what had happened?

A. Uh-huh, told my momma.

Q. Did you tell anybody else?

A. Yeah. I told my aunt. I went over to her house.

Q. Did you tell anybody else?

A. Uh-uh.

Q. Which aunt was that?

A. Huh?

[37]

Q. What aunt was that?

A. Aunt Bonita.

Q. Aunt Bonita. Where does she live?

A. She lives at Christopher where the trailers and stuff are at.

Q. Did you later talk to some social workers?

A. Uh-huh. Who, she did?

Q. Pardon me? Do you know Kathy Babb?

A. Right in there?

Q. Yes. Do you know Kathy?

A. Uh-huh.

Q. Do you know Beverly?

A. Uh-huh.

Q. Did you talk to them?

A. Yes. Over at my house.

Q. Did you get hurt in any way?

A. Where?

Q. By Sergio. Did he hurt you?

A. Uh-uh.

Q. Had he ever done this before?

A. I don't know about that.

Q. Has he ever done it to you before?

A. Uh-uh.

Mr. Rogers: No further questions.

The Court: Mr. Embry.

[38]

Cross-Examination by Mr. Embry:

Q. Hello, Tyronda.

A. Hi.

Q. How are you this morning?

A. Fine.

Q. Tyronda, do you remember now about how long ago it was that Sergio had his birthday?

A. Uh-uh.

A. Could you make a guess?

A. A guess?

Q. Uh-huh. Well, was it two months ago? Do you know how long a month is?

A. Uh-uh.

Q. Do you know that this month is February?

A. Uh-huh.

Q. Do you know the name of the month when Sergio had his birthday?

A. No.

Q. You don't remember anymore?

A. Uh-uh.

Q. Was it a long time ago?

A. Uh-huh.

Q. Where abouts were you-all when you were alone with Sergio?

A. Huh?

Q. Where were you when you were alone with Sergio on Sergio's birthday?

[39]

A. It was at Broad Street. We was in there playing games and he come and got me.

Q. This happened on Broad Street?

A. Uh-huh.

Q. I thought when Mr. Rogers was asking you questions you said you were over on Cherokee Park?

A. No. I was living over in Cherokee Park, over there in Cherokee Park.

Q. So is that where you were on Sergio's birthday?

A. Yeah, when Kathy talked to me, when Kathy came over there and talked to me.

Q. Oh, I see. When the social worker talked to you you were at Cherokee Park?

A. Yeah.

Q. But you were visiting that day. Is that right?

A. Uh-huh.

Q. Whose house was that?

A. Where?

Q. At Cherokee Park.

A. I was at Cherokee Park and then Kathy came and talked to me.

Q. I understand that, Tyronda. Whose house was that that you were at when Kathy talked to you.

A. My momma's.

Q. Your mother's. So you didn't live on Broad Street then?

A. Uh-uh.

[40]

Q. But where were you—I'm not talking about when you talked with Kathy—where were you when you were alone with Sergio on Sergio's birthday?

A. At Broad Street.

Q. Whose house was that?

A. Mary's.

Q. Who is Mary?

A. The woman sitting back there with my aunt.

Q. Mary Tandy?

A. Uh-huh.

Q. Tyronda, how long was it between the time you were at Broad Street at Mary's house on Sergio's birthday until the time you were at your house at Cherokee Park when you talked to Kathy?

A. I don't know.

Q. Was it a long time?

A. Uh-huh.

Q. So it wasn't the next day then, was it?

A. No.

Q. Do you know how long it was?

A. Uh-uh.

Q. Was it one week, two weeks?

A. I forgot about that.

Q. Huh?

A. I don't know.

Q. You don't remember anymore? But it was several days though. Is that true?

[41]

A. Uh-huh.

Q. When did you first tell someone about what happened on Sergio's birthday?

A. When my momma came home I told momma and then my mother—my aunt—told my aunt.

Q. Wow, slow down, Tyronda. Talk very slowly because these people here want to hear what you're saying, okay? If you talk real fast none of us can hear you. Okay. You promise to do that for me?

A. Uh-huh.

Q. You told your mother that very same day after it happened?

A. Uh-huh.

Q. And she did what, Tyronda?

A. Huh?

Q. What did your mother do when you told her?

A. She was mad.

Q. She was mad?

A. Uh-huh.

Q. What did she say?

A. She was going to call the policeman.

Q. Did she?

A. Uh-huh.

Q. I thought you said it was several days before you talked to Kathy?

A. First Kathy came to my house.

Q. Okay. When was that? Was it the next day?

A. I don't know.

[42]

Q. Well, if your mother called the police, did the police come?

A. Uh-huh.

Q. They came that very same day?

A. I don't know.

Q. What you told me, I think, is that you were at Broad Street on Sergio's birthday, right?

A. Uh-huh.

Q. How long was it before your mother came back? Was it a long time that day or just a little while?

A. I forgot.

Q. You forgot?

A. Uh-huh.

Q. Was it several hours? In other words, the same day that this happened you told your mother, is that so?

A. Uh-huh.

Q. But did you talk to any policeman that same day that you talked to your mother?

A. Uh-uh.

Q. When was it that you ever talked to a policeman?

A. I don't know because my uncle is a policeman out in St. Louis.

Q. I'm talking about the policemen here in Hopkinsville. How long was it between the time you talked to your mother and you talked to somone else about this like a policeman or Kathy? Was it the next day? Was it several days?

A. I think it was several days.

[43]

Q. Seven days?

A. Several.

Q. Several days. Do you know why it was several days after you told your mother that you talked with anyone else about it? You don't know?

A. Uh-uh.

Q. Who was the next person you talked to about it after you talked to your mother?

A. My aunt.

Q. Which aunt is that?

A. Aunt Bonita.

Q. When was that, several days later?

A. Yeah. After Sergio's birthday I went over to my Aunt Bonita's. My mother let me spend the night over there.

Q. Why did you tell your Aunt Bonita? Did she ask you about it?

A. No. I just told her. All my aunts are in St. Louis.

Q. But you had already told your mother already. Is that right?

A. Uh-huh.

Q. And you don't know why you told your Aunt Bonita?

A. No.

Q. Was it shortly after you told your Aunt Bonita that you talked to Kathy? It was still several more days after that?

A. Yeah. I talked to Kathy. I talked to my momma and I talked to my Aunt Bonita.

Q. Oh, wait a second. You mean actually you talked to Kathy first? She's the first person you told about it?

[44]

A. Uh-huh.

Q. Now, a minute ago you said your mother was the first person you told about it.

A. No. I told Kathy. My momma was gone.

Q. Okay. So you didn't tell your mother the day it happened?

A. Uh-uh.

Q. Why did you say a minute ago that you did?

A. Well, I told Kathy first when she came to my house.

Q. Okay. But a minute ago, Tyronda—you told us a little bit ago you knew the difference between the truth and a lie, didn't you?

A. Yes.

Q. Now, a minute ago you said that you told your mother the very day that it happened, didn't you?

A. Yeah. I hold her over on Broad Street.

Q. But just a minute ago you told me that wasn't true, that the first person you ever talked to about it was to Kathy.

A. I know my mother was talking to somebody and then I did.

Q. Tyronda, slow down, please honey. Promise me you'll speak slowly. Please try to speak slowly. These people want to hear what you're saying very badly. If you talk real fast, they can't understand you, Tyronda. Why are you talking so fast? Are you scared?

A. (witness nods affirmatively)

Q. Why are you scared?

A. Don't know.

Q. You don't know. Did someone tell you what you were supposed to

[45]

say?

A. Uh-huh.

Q. Who told you?

A. Kathy told me I would come in here and talk.

Q. Did she tell you what you should tell these people here?

A. (witness nods negatively)

Q. She didn't. Okay. This is very, very important, Tyronda. Please listen very carefully to what I'm saying. Is it true that the very first person you told—now, Mr. Rogers asked you some questions about what happened on Sergio's birthday, right, and you answered. Who was the very first person you ever told that that happened to you? Who did you talk to the very first time?

A. My momma.

Q. Your mother?

A. Uh-huh.

Q. And that was the very same day it happened. Is that so?

A. Uh-huh.

Q. But a minute ago you said that Kathy was the first person you ever talked to about it.

A. I thought it was Kathy first.

Q. You thought it was Kathy first. Why did you think it was Kathy first? You must know, Tyronda, who you told first about this. Was it Kathy or was it your mother. They both can't be true. One's true and one's not true.

A. My momma.

[46]

Q. Well, why then did you say it was Kathy?

A. I don't know.

Q. You must know, Tyronda. If you said that, that's a lie and you said you wouldn't say a lie. Why did you say it was Kathy? Do you realize that if you didn't tell Kathy first and you told these ladies and gentlemen that it was Kathy that that's not true? Do you understand that?

A. (No answer)

Q. But now you don't know why you told them it was Kathy first?

A. (No answer)

Q. Do you know why you told them that?

A. (No answer)

Q. You don't know? Did someone tell you to say it was your mother?

A. No.

Q. So the truth is—what you promised to tell was the truth—you're saying the truth is you told your mother first?

A. Uh-huh.

Q. Answer so they can hear you, sweetheart.

A. I told my momma first.

Q. You told your mother first. And then who did you tell next?

A. Kathy.

Q. A minute ago you said it was your Aunt Bonita you told next.

A. I told my momma then when Kathy came to where my Aunt Bonita lives.

Q. You're telling several different versions of this story, Tyronda. I can't understand why you're doing that. In other words, first of all you

[47]

said it was your mother and then it was Aunt Bonita and then Kathy came to Aunt Bonita's house and then you turned around and you said no, I talked to Kathy first and then I told my mother and then I told Aunt Bonita and now it's a different way. It's got to all be one way Tyronda. Do you understand that?

A. Uh-huh.

Q. What way was it really?

A. My momma then my Aunt Bonita.

Q. A minute ago you said it was your momma and then it was Kathy. Now you say it's your momma and then your Aunt Bonita. Do you understand there's only one truth, there's only one way it could have been? You're old enough to remember, aren't you, what happened? You can remember, can't you? You're not sure?

A. Uh-uh.

Q. Do you remember what happened with Sergio? Is that true? Are you remembering that right?

A. Uh-huh.

Q. How come you can remember that but you can't remember these other things?

A. (No answer)

Q. You don't know? So now you say—you tell the jury, Tyronda, in order—this happened to you, okay, then you told someone, then you told some other people. Tell the jury—look at these people here and tell them what's right, the real version of the story, the way it really hap-

pened, the way you remember it, not what someone's told you but what

[48]

you remember.

A. First I told my momma and then I told Kathy and then I told my Aunt Bonita.

Q. Now you've changed again.

Mr. Rogers: Your Honor, the defense counsel is changing. If he would let her stick with one story, that would be fine.

Mr. Embry: That's the problem, Judge. There's not been one story.

The Court: Tyronda, you're doing fine. We're glad to have you in here with us, all of us are, the jury and Mr. Rogers and Mr. Embry. Now, Mr. Embry has asked you and Mr. Rogers did too back on Sergio's birthday when your momma came home, what happened? Can you tell us? Tell the jury.

A. I told my momma when she was talking to this man.

The Court: You told your momma when what?

A. I told my momma when she was talking to this man.

The Court: What happened then?

A. Then on the next day I went back over to our house.

The Court: Over to who's house?

A. In Cherokee park.

The Court: In Cherokee Park. That's your house, isn't it?

A. Uh-huh.

The Court: What happened there?

A. Then Kathy and them came over there.

The Court: Well, what happened then?

[49]

A. Then Kathy and them left and then I went over to my aunts.

The Court: Your aunt who?

A. Bonita.

The Court: And where does she live?

A. In Christopher Trailer—.

The Court: Christopher Trailer Park?

A. Uh-huh.

The Court: Did you tell anybody else?

A. Uh-uh.

Q. Did you ever talk to a man who was a policeman about it?

A. Uh-uh.

Q. You never ever did?

A. Uh-uh.

Q. Okay. So the only people you told were your mother, Aunt Bonita and Kathy?

A. Uh-uh.

Q. You never told anybody else until today?

A. No.

Q. Let me talk to you just a little bit about what happened on Sergio's birthday. Tyronda, you understand I'm just trying to help everybody here understand what happened. It's my job. I'm not trying to worry you or bother you or make you feel bad, but I've got to do my job. Do you understand that?

A. Uh-huh.

Q. Okay. That day on Sergio's birthday, you were at Broad Street.

[50]

Is that right?

A. Uh-huh.

Q. And that's where Mary Tandy lives?

A. Uh-huh.

Q. Now, who was there when you first got to the house on Broad Street that day?

A. My momma and then my momma left.

Q. Now, slow down Tyronda. Now, who was there first when you first got there?

A. Mary and my momma.

Q. Mary and your mother. Okay. Who else was there?

A. And Sergio.

Q. Who?

A. Sergio.

Q. Speak up so these people can hear you.

A. Sergio.

The Court: Who is that?

Q. Sergio. Okay. Who else was there?

A. Sharika and me and my sister and her brother.

Q. So how many children were there?

A. Seven.

Q. Seven children were there?

A. Uh-huh.

Q. Okay, seven children and Mary and your mother and Sergio. Is that right?

[51]

A. Uh-huh.

Q. Now, how long was it before your mother and Mary left?

A. I don't know.

Q. A little while?

A. Uh-huh.

Q. But then they left at some point. Is that so?

A. Uh-huh.

Q. And then it was Sergio and you and your sister and five other children. Is that right?

A. Uh-huh.

Q. Did y'all start playing some games?

A. Uh-huh.

Q. Okay. What kind of games were you playing?

A. First we were playing house.

Q. Excuse me. Speak up a little bit.

A. We were playing house.

Q. You were playing house. And who was playing house?

A. Me and Sharika and Eric and my sister and brother.

Q. All the children were playing house?

A. Uh-huh.

Q. What was Sergio doing?

A. He came in there and got me.

Q. Came in and got you?

A. Uh-huh.

Q. What room were you in?

[52]

A. In Mary's room.

Q. You were in Mary's room?

A. Uh-huh.

Q. Were all the children in Mary's room?

A. Uh-uh.

Q. Where were the other children?

A. In Sharika and Eric's room.

Q. I thought you were all playing house.

A. I was then he came and got me.

Q. Came and got you?

A. Uh-huh.

Q. Okay. Where did y'all go?

A. Us?

Q. Uh-huh. Where did you and Sergio go?

A. In Mary's room.

Q. In Mary's room. Who else was in Mary's room?

A. Eric. (phonetic)

Q. So Eric was in there?
A. Uh-huh.
Q. And somebody else?
A. No.
Q. Just you and Eric and Sergio?
A. Uh-huh.
Q. What did Sergio tell you? Did he say anything to you?
A. Uh-uh.

[53]

Q. He didn't say anything?
A. He just told me to come here.
Q. He just told you to come here?
A. Uh-huh.
Q. Okay. Then what did he say to you?
A. Nothing. Then he came and got my sister.
Q. Wait a minute, honey. You and Sergio and Eric went to Mary's room? Is that right?
A. Uh-huh.
Q. Okay. Well, what did Sergio say to you?
A. Nothing. He told me to come here then he got the sock out of the drawer and put it around my eyes.
Q. Put it around your eyes?
A. Uh-huh.
Q. Whose sock was it?
A. Sharika's.
Q. Sharika's sock?
A. Sharika.
Q. Sharika?
A. Uh-huh.
Q. Okay. And it was her sock?
A. Uh-huh.
Q. How did he put it down over your eyes. Show the people how he did it.

A. He put it like this. (demonstrating)

[54]

Q. He covered your eyes?
A. Uh-huh.
Q. Was it a real thick sock?
A. Uh-uh.
Q. What kind was it?
A. It was a red one.
Q. A red sock?
A. Uh-huh.
Q. Did he tell you why he was putting a sock over your eyes?
A. Uh-uh.
Q. He didn't tell you? Did you ask him why?
A. Uh-uh.
Q. Why didn't you ask him why he was doing that?
A. (No answer)
Q. You don't know. Okay. After he put the sock over your head—and talk real slowly, Tyronda, because when we get to this part you tend to talk fast, talk slowly. He put the sock over your head and then what happened?
A. Then he put some pudding in my mouth.
Q. Put some pudding in your mouth?
A. Uh-huh.
Q. What kind of pudding was it?
A. Some chocolate pudding.
Q. Did you eat the pudding?
A. Uh-huh.

[55]

Q. How much did he put in your mouth?
A. A spoon.
Q. Just a spoonful?
A. Uh-huh.
Q. And you swallowed it and ate it?

A. Uh-huh.

Q. Did he tell you why he was doing that?

A. Uh-uh.

Q. Did you ask him?

A. Uh-huh.

Q. What did he say?

A. He said just be quiet now and then he put some pudding in my mouth.

Q. What happened after he put the pudding in your mouth?

A. He put his d-i-c-k in my mouth.

Q. Who taught you the word d-i-c-k?

A. In a book.

Q. Huh?

A. In a book.

Q. What book was that?

A. When I was going to Belmont—.

Q. Don't talk so fast, sweetheart. Talk slowly. Go ahead.

A. I heard it at Belmont.

Q. Huh?

A. Belmont had it in a book.

[56]

Q. Who had it in a book?

A. Belmont did.

Q. Who's he?

A. No. It was at Belmont in a book.

The Court: Belmont in a book.

A. Uh-huh.

Q. You mean you learned that word at school?

A. No. It was in our reading book.

Q. In a reading book?

A. Uh-huh, like a boy's name. It was like a boy's name.

Q. Okay, but honey there's a difference between a man's name whose named Dick.

A. No. This was a little boy.

Q. Well, a little boy who's named that and the way you're using that term now. Who told you to say that word, d-i-c-k.

A. I saw it in a book.

Q. No, no, honey. I realize you saw that word as a person's name in a book, but that's not the way you were using that word today. It's a much different meaning you're giving to that word today when you're telling these people you're spelling d-i-c-k. Do you know what that means?

A. Uh-uh.

Q. Don't have any idea?

A. Uh-uh.

Q. Okay. Well then, honey, if you don't know what it means, someone

[57]

must have told you to say that word today. Who told you to say that word?

A. Nobody.

Q. If nobody told you and you don't know what it means, why are you saying it if you think it's somebody's name? Do you understand what I'm saying?

A. (witness nods negatively)

Q. You don't?

The Court: Let's go at it directly.

Q. Honey, you're saying d-i-c-k. What do you mean by that today?

A. (witness nods negatively)

Q. You don't have any idea? You're saying that Sergio had a d-i-c-k. Do you know what that means, Sergio's d-i-c-k?

A. Uh-uh.

Q. In other words, his name is Sergio and you're saying that what you know Dick to be is someone's name. His name isn't Dick, right?

A. Uh-uh.

Q. You know that. Well then, you're saying he put his d-i-c-k in your mouth. He didn't put someone's name in your mouth, did he?

A. Uh-uh.

Q. Well, then, what did he do? What does that word mean to you then? What are you using it to describe? You don't know?

The Court: Let's try it this way. What did Sergio put in your mouth?

A. Some pudding.

The Court: All right. After the pudding.

[58]

A. (answer phonetic)

The Court: We've got to ask that question, Tyronda. You need to tell us what he put in your mouth, okay? Can you do that? Tell us what he put in your mouth?

A. Pudding.

The Court: We're all your friends.

Q. Honey, it may be hard for you but it's very important that you tell what happened about it.

The Court: Tyronda, you're doing fine.

Q. You've been doing real good, honey. These ladies and gentlemen are your friends, honey. They want to know what happened.

The Court: Can you tell us what happened? Can you tell us what you told your mother?

A. That he feed me. (witness crying)

The Court: Let's take a short break.

Mr. Rogers: She just answered your question.

The Court: Oh, she did.

Mr. Embry: I didn't hear it, Pete, what did she say?

Mr. Rogers: You want me to ask her?

The Court: What did you tell your mother?

A. I told my mother what Sergio did.

Mr. Embry: What Sergio did? Is that what you understood, Judge?

The Court: What did you tell her that he did?

A. What he did.

[59]

The Court: Let's take a short break.

Mr. Rogers: Your honor, I think if I can ask her a question it would clear this up.

The Court: Well, I'm not sure now is a good time to continue it. Are you okay, Tyronda? Do you want to keep going or do you want to take a little break? Do you want to take a little break?

A. Uh-huh.

The Court: Get Kathy out here.

(social worker comes in)

The Court: Tyronda needs to take just a little break. I want to make certain that you don't discuss any testimony with her or ask her what has happened. She needs to regain her composure. You can go with Kathy, all right? I don't want to recess at this point in time. I want to see if we can continue on right now. Y'all just take a couple of deep breaths. Mr. Rogers, you want to tell Ms. Ghigliotty when she thinks Tyronda has regained her composure she can bring her back in.

(witness comes back in)

The Court: Tyronda, are you okay?

A. (witness nods yes)

The Court: Can you tell us what happened now?

A. (no answer)

Q. Do you feel better, Tyronda?

A. (no answer)

Q. Honey, let me ask you a question. Why do you feel so upset right

[60]

now?

A. (witness nods negatively)

Q. You don't know?

A. (witness nods negatively)

The Court: You can tell us, Tyronda.

Q. Is anybody making you scared or is there something that's really bothering you? Are you frightened of me?

A. (witness nods negatively)

Q. Is anybody in the courtroom here bothering you or frightening you?

A. (witness nods negatively)

Q. Well, honey, it's very, very important for Sergio, for me, for all these people here that you tell us what happened, exactly what happened. You apparently said something happened to you and we all need to know what it is and we just want to know the truth that you said that you would tell us all. You said it was wrong to tell a lie, didn't you?

A. (witness nods affirmatively)

Q. To tell a story. You're not supposed to tell stories. Something happened to you on Sergio's birthday. You've already said that you were in a room with he and Eric and he put a sock over your face, over your eyes, put some pudding in your mouth and you ate the pudding, he put one spoonful you said. Is that right?

A. (witness nods affirmatively)

Q. You remember saying that, right?

A. (witness nods affirmatively)

[61]

Q. But then what happened after you ate the pudding?

A. (no answer)

The Court: Tyronda, can you tell us?

A. (witness nods negatively)

Q. Honey, why can't you tell us? What bothers you about telling us?

A. (no answer)

Q. Do you think it's wrong to tell us?

A. (witness crying)

The Court: Take a deep breath. Can you do that? (witness does so)

The Court: Can you take another deep breath. Do you need a handkerchief?

Q. Honey, would it bother you if you told us a story?

A. (witness nods negatively)

Q. It wouldn't bother you if you told us a story? Think about what I said. Now, a minute ago you said it was wrong to tell a story, didn't you, Tyronda? Is that right? It's wrong, isn't it?

A. (no answer)

Q. The judge a few minutes ago asked you—you swore to God—you remember who God is, don't you, that you wouldn't tell a story. Do you remember him doing that?

A. (witness nods affirmatively)

Q. Okay. Do you think God would get mad if you told a story?

A. (witness nods affirmatively)

The Court: Can you tell us yes? Can you talk to us?

[62]

Q. Would it bother you then if you told a story like that?

The Court: Tyronda, what would happen if you told a story?

A. Get in trouble.

The Court: Tyronda, you can talk to us, can't you? Tyronda, can you look at me? Is your eyes bothering you? Tyronda, what would happen if you told a story?

A. I would get in trouble.

The Court: Tyronda, what would happen?

A. I would get in trouble.

The Court: You would get in trouble?

Q. Well honey, you haven't told us a story so far this morning, have you?

A. (no answer)

Q. Are you afraid of getting in trouble, Tyronda?

A. (witness nods yes)

Q. You are. Why are you afraid of getting in trouble?

A. (no answer)

The Court: All right, I don't know if any of the three of us are going to do any better than the other. Tyronda, now take a deep breath for me. Can you look at me? Can you tell me what happened on Sergio's birthday? Can you do that? I know you don't want to tell, do you? Is that right? You've got to talk, okay? Does it embarrass you to tell what happened?

A. (no answer)

The Court: You've already told me once, haven't you?

[63]

A. (no answer)

The Court: Can you tell it so the jury can hear?

A. (no answer)

The Court: Tyronda, can you tell us what happened on Sergio's birthday?

A. (Answer phonetic)

The Court: Take your time. What happened? Something happened. What was it?

A. (no answer)

The Court: Do you remember what is was? Can you tell me if you remember? Can you remember? Can you tell me what it was?

A. (witness nods negatively)

The Court: You can't tell me what it was?

A. (no answer)

The Court: Is what you told us before the truth?

A. (witness nods affirmatively)

The Court: Can you tell us so we can understand what the truth is? Can you help us? Can you explain it? Can you do that for us? Are you okay?

A. (witness nods negatively)

The Court: You're not okay? Can you tell us what happened? You already have once. Can you tell us again?

A. (No answer)

The Court: Do you think somebody is going to be mad at you

[64]

if you tell?

A. (witness nods negatively)

Mr. Rogers: Your Honor, has the defense passed the witness? I'm confused as to where we are.

The Court: No, He has not passed the witness.

Mr. Embry: We got to the point where I was trying to explain to her—to get her to explain to me who told her to say the word d-i-c-k and we haven't gotten a response from her since. Your Honor, I don't really know how to

proceed here. I have other questions to ask her. If she's not going to respond I don't want to make it hard on her.

The Court: I understand. I don't know if there is an answer.

Mr. Rogers: Your Honor, may I make a suggestion?

The Court: Yes, you may.

Mr. Rogers: I suggest the defense pass the witness. I'll ask her several more questions and then you can allow the defense to ask her further questions.

Mr. Embry: I have no objection. Go ahead.

The Court: Tyronda, you remember Mr. Rogers?

Redirect Examination by Mr. Rogers:

Q. Tyronda, can you draw me a picture of a d-i-c-k? Can you take this piece of chalk? We've got a little bitty piece of chalk here. Just

[65]

draw me what you think it looks like. Can you do that?

Mr. Embry: Your Honor, I think at this point I may object because I think she previously said that she doesn't know what the word d-i-c-k means.

The Court: Well, I understand your objection. I'm going to overrule it.

Q. Tyronda, do you also call a d-i-c-k a pee-pee?

A. (No answer)

Q. Tyronda, look at me just a minute. Did you tell us all a story about this? Have you told us all a lie?

A. (Witness nods negatively)

Q. Did you tell us a story about Sergio?

A. (Witness nods negatively)

Mr. Embry: Your Honor, the only suggestion I can think of at this point is to possibly let her be excused.

Mr. Rogers: Your Honor, I'm going to pass the witness back to Mr. Embry. I think she answered on direct ex-

amination these questions. Now she's upset.

Mr. Embry: Judge, I obviously was trying to make some points or to understand from her where she learned of that word, who told her to say that today.

The Court: I guess the only thing we can do now is to see if she will answer any of your questions. If she will not, pass her. We can come back to her.

Mr. Embry: That's what I was going to suggest, Your Honor.

[66]

The Court: Tyronda, we've just got a few more questions to ask. Do you want to do them now or do you want to do them later? Can you do them now? Can you talk to us?

A. (witness nods negatively)

The Court: You can't talk to us?

A. (witness nods negatively)

The Court: Let's get Kathy back in here. Again, separation of witnesses, do not discuss. Tyronda, you can go with Kathy.

PAULINE NICOLE GRIFFIN: After being first duly sworn, testified as follows:

Direct Examination by Mr. Rogers:

Q. Nicole, what is your full name? What is your name?

A. Pauline Nicole Griffin.

Q. And how old are you Pauline?

A. Seven.

Q. Do you go to school?

A. Yes ma'am.

Q. Where do you go to school?

A. Indian Hills.

Q. Do you know Sergio?

A. Yes ma'am.

Q. Is he in here in this room today? Would you look around and see if you see him.

[67]

A. Yes ma'am.

Q. Where is he?

A. Over there.

Q. Could you tell us what color shirt he has on?

A. Red.

The Court: The record will reflect.

Q. Nicole, how long have you known Sergio?

A. I don't know.

Q. Nicole, do you remember when Sergio had a birthday?

A. Yes ma'am.

Q. Do you remember where you were when he was going to have that birthday?

A. Yes ma'am.

Q. Where were you?

A. On Broad Street.

Q. Over where?

A. On Broad Street.

Q. Broad Street. Where do you live?

A. I live with my cousin.

Q. Where is that? Do you know what street that is?

A. The one I just said, Broad Street.

Q. You don't live somewhere else now?

A. No ma'am.

Q. You were over on Broad Street when Sergio was having a birthday party? Do you remember that day?

[68]

A. Yes ma'am.

Q. Who else was there?

A. Sharika, my little sister, and my big sister.

Q. How old is Sharika?

A. Nine.

Q. How old is your little sister?

A. Three. I mean four.

Q. Is Tyronda your sister too?

A. Yes ma'am.

Q. Can you tell us what happened?

A. I guess so.

Q. Well, let's hear it.

A. He put a red sock around my eyes. That's all I know and I don't know a bit more.

Q. He put a red sock around your eyes and what else did he do?

A. (No answer)

Q. Do you remember what else he did?

A. No ma'am.

Q. You don't remember?

A. Uh-uh.

Q. Did you talk to anybody else about this? Did you talk to anybody else about this?

A. Yes ma'am.

Q. What did you tell them?

The Court: Do you remember what you told them, Nicole?

[69]

Do you remember what you told them? Nicole, do you remember?

A. Uh-huh.

The Court: Do you remember what happened that day?

A. (Witness nods affirmatively)

The Court: You don't remember what happened that day? Remember you promised to tell us the truth. Did something happen to you that day?

A. (Witness nods affirmatively)

The Court: It did? Nicole, what was it? You can tell us.

A. Tell all these people?

The Court: Yeah. These people are your friends. We're all your friends, okay? Don't they look like nice people? I'll bet they've all got little girls just like you. Can you tell me what happened that day? Why don't you just tell me. You can just look at me and tell me.

A. He put some pudding on his d-i-c-k and put it in my mouth. That's all I know.

The Court: What's a d-i-c-k? Do you call that something else?

A. (Witness nods affirmatively)

The Court: What do you call it? You can tell me. What do you call it?

A. I'm scared.

The Court: What?

[70]

A. I'm scared.

The Court: You're not scared of me, are you?

A. Yeah.

The Court: You are. Haven't I been real friendly and real nice? You're scared? You don't have to be scared. Can you tell me what that is? What do you call that? You can tell me. What do you call it? Do you have a nickname for it?

A. Yeah.

The Court: What do you call it?

A. Ding-Dong.

The Court: Ding-Dong?

A. That's what I call it.

The Court: Mr. Rogers. Can you talk to Mr. Rogers too?

A. (witness nods affirmatively)

Mr. Rogers: No further questions. I'll pass the witness.

Mr. Embry: Your Honor, I didn't hear all of what she stated to the Court. The last thing I actually heard was she told Mr. Rogers that he put a sock over her eyes. I'll ask her some questions.

The Court: I don't mind repeating. I just don't know whether it's a good idea.

Mr. Embry: That's fine. Let me just ask her some questions.

The Court: Nicole, you remember Mr. Embry, don't you?

A. Yes ma'am.

[71]

The Court: He needs to ask you some questions. Will you answer them for him? You're doing real good. Can you keep doing good?

A. Yes ma'am.

Cross-Examination by Mr. Embry:

Q. Nicole, do you remember Sergio's birthday?

A. Yes ma'am.

Q. Why do you remember Sergio's birthday?

A. I don't know.

Q. You don't know?

A. No ma'am.

Q. Well where did you go on Sergio's birthday?

A. Nowhere.

Q. Nowhere? Where were you on Sergio's birthday? You had to be someplace.

A. Over at his house.

Q. Okay. Where does he live?

A. On Broad Street.

Q. On Broad Street. Okay. Who else lives there?

A. Mary.

Q. Okay. Now, who's Mary?

A. Mary is my auntie.

Q. Your Auntie?

[72]

A. Yes ma'am.

Q. Sergio was living with your auntie. Is that right?

A. Yes ma'am.

Q. Where were you living on Sergio's birthday? You didn't live on Broad Street, did you? Where were you living?

A. On Cherokee Park.

Q. Cherokee Park, okay. Well, then, you must have gone from Cherokee Park to Broad Street on Sergio's birthday. Did you?

A. Yes ma'am.

Q. Okay. Who all went over there?

A. Me, my sister, and my other little sister, and my brother and my mom.

Q. Your mother and you and how many—three other children—so it was four children all together and your mother?

A. (Witness nods affirmatively)

Q. Okay. Who was there at Broad Street when you got there?

A. Mary and Sergio.

Q. Mary and Sergio, okay. So that meant that there was Mary, Sergio, and your momma and you, Tyronda and who were the other children, honey? Name them for me.

A. Sharita and Mann.

Q. Sharita and who else?

A. And Mann—Bruce. I call him Bruce.

Q. There weren't any other children there?

A. Yeah.

[73]

Q. Okay. Who else was there?

A. Sharika, Eric and Tonkie.

Q. So we have ten people all together. Is that right?

A. Yes ma'am.

Q. Did your mother and Mary leave sometime?

A. Yes ma'am.

Q. How long were you there when they left?

A. I don't know because I didn't have no watch to see.

Q. Oh, I see. About how long was it? Was it a long time or just a short time?

A. A long time ago.

Q. Oh, it happened a long time ago? Okay. Where did your mother and Mary go to? Do you know?

A. To buy the cake for Sergio's birthday.

Q. What happened while they were gone, your mother and Auntie Mary?

A. We was in the house and we was playing house first.

Q. Okay, now. Who was playing house, Nicole?

A. Me, Sharika, Eric, Mann and Tonkie.

Q. That's how many people? That's one, two, three, four, five people? Okay. But there was some other children. Where were they?

A. Rita was in Sergio's room.

Q. Was in whose, in Sergio's room?

A. Yes ma'am.

Q. Okay, And who else?

[74]

A. That's all.

Q. Well, y'all were playing house. What were you doing playing house, Nicole? I mean, how were you all playing. What were you doing?

A. We was playing like we had food, play food.

Q. Like you had play food. Okay. What kind of play food did you have?

A. We didn't really have nothing on our plates.

Q. You just had some plates and you were pretending like there was food?

A. Yeah. We had some donuts and pretending like that was food.

Q. Okay. Some donuts?

A. Yes ma'am.

Q. Well, how long did y'all play house? Did you play for a long time?

A. Yes ma'am.

Q. What happened when you finished playing house?

A. (No answer)

Q. Nicole, you were doing real fine, sweetheart. You were telling me everything that happened that day and you were doing real good. You said y'all were playing house and you had some donuts and plates and you were pretending that there was some other food there. You quit playing at some time, didn't you? Didn't you stop playing some time or other?

A. Yes ma'am.

Q. Okay. That's good. Well, what happened when you stopped playing house? Now, honey, you told Judge

White up there and told all of us that you would just tell what happened, that you would tell the truth, that

[75]

you wouldn't tell a story, so why don't you tell us all what happened after you finished playing house. You've done real good up to that point, sweetheart. Everybody here is your friend. We all want to know what happened. That's all we want to know, but we need for you to tell us. It's very, very important.

A. He put some pudding—I had some pudding.

Q. Wait a second. Now, you were in the room playing with the other children. Is that right?

A. Yes ma'am.

Q. Okay. Did you stay in that room? Did you stay there with the other kids, the other children?

A. No ma'am.

Q. You didn't. Well, what happened?

The Court: It's okay, Nicole. You can tell us. You can tell us, can't you?

Q. Nicole, let me ask you a question. You've answered all my questions up to now and you've done real, real good. Why is it that right now you don't want to answer my questions like you did before? Are you scared? Say something. Do you mean yes or no? Give me an answer. Are you scared?

A. Yes ma'am.

Q. Okay. Why are you scared, Nicole?

A. I don't know.

Q. You don't know?

A. No.

[76]

Q. Well, do I scare you?

A. Yes.

Q. Why?

A. (No answer)

Q. Do these people here next to me, do they scare you?

A. Yes ma'am.

Q. Why do they scare you? You don't know any of them, do you? Have you ever seen them before?

A. (witness nods negatively).

Q. Okay. Well, why are you scared of them?

The Court: Nicole, do you know that we all came down here today so that you could tell us what happened? Do you know that's why we're here? All these people are here to be your friend. That's why they're here. Do you know that? You told me what happened. Can you tell them what happened? You can do it now, can't you?

A. No, I can't.

The Court: Yes, you can.

A. Uh-uh.

The Court: Can you try? Now, how old are you?

A. Seven.

The Court: Seven years old. You can tell us what happened. You can answer Mr. Embry's questions. Can't you do that? Huh? Aren't you seven years old? Can you try and answer Mr. Embry's questions?

[77]

A. (witness nods negatively)

The Court: You did it for me. I think she can answer, Mr. Embry. Why don't you try it again.

Q. Nicole, y'all were playing house, right?

A. Yes.

Q. Were y'all having a good time?

A. Yes ma'am.

Q. And some point you quit playing house, didn't you?

A. Yes ma'am.

Q. What happened when you quit playing house?

A. Sergio put some pudding on his d-i-c-k.

Q. Wait a second. Sergio put some pudding on his d-i-c-k. Did you see him do that?

A. No.

Q. Somebody told you he did it?

A. (witness nods affirmatively)

Q. Who told you that he did it?

A. Sharika.

Q. Sharika told you that. You didn't see that happen though?

A. She came in there and Sergio told her to get out.

Q. Then what happened after that?

A. I asked him could I have some pudding. He told me to stay in the house.

Q. Slow down.

The Court: You might just let her get it out any way she

[78]

can.

Mr. Embry: Okay, Judge. Go ahead, Nicole.

A. I asked him could I have some pudding. He said I could have some pickle.

Q. He told you you could have some pudding.

A. Not pudding, pickle, pickles.

Q. He told you you could have some pickles. Did you want some pickles?

A. Yes ma'am.

Q. You wanted a pickle. Okay, did he give you a pickle to eat?

A. Yes ma'am.

Q. Did you eat the pickle?

A. Yes ma'am.

Q. Was it good?

A. Yes ma'am.

Q. What happened after that?

A. That's all.

Q. That's all that happened? That's all you know about? You wouldn't tell any of us a story here today, would you?

A. No ma'am.

Q. What would happen if you told a story?

A. God would be mad at you.

Q. He'd be mad at you, right, because you're the one that told the story, right? Are you afraid of getting anybody mad at you today?

A. No ma'am.

[79]

Q. Okay. So what you've just told me is everything that happened that day that you remember, and then did your mother and Mary come home after that?

A. Yes. She gave us some balloons and then our balloons flied up in a tree.

Q. And then did y'all go home later that day?

A. After we had—we spend the night over there.

Q. Okay. You spent the night there. Did Sergio spend the night there too?

A. He was sleeping with Mary.

Q. Okay, but he was there with Mary. He lived there, didn't he?

A. Yes.

Q. Did you ever tell your mom anything about what happened that day?

A. No.

Q. Never did?

A. No. I think my big sister did.

Q. Did what, honey?

A. My big sister, I think she did.

Q. Your big sister told her something?

A. I think she did.

Q. But you don't know, you think she might have? Is that Tyronda?

A. Yeah.

Q. But you didn't tell her anything?

A. (witness nods negatively)

[80]

Q. Okay. Have you ever told anybody about what happened that day, what you told these people here today?

A. (witness nods negatively)

Q. Never have? Nobody? This is the first time you've ever told anybody what happened today?

A. Yes ma'am.

Q. And everything you've said has been the truth?

A. Yes ma'am.

The Court: Let's ask the leading question on that.

Mr. Embry: What's that, Judge?

The Court: Let's ask the leading question, the social worker.

Q. Have you ever told a social worker that anything happened that day?

A. Yes ma'am.

Q. What did you tell Kathy?

A. I told Kathy about what I said now. I told both of them just what I said now.

Q. You didn't tell them anything else but what you said now?

A. Yes ma'am.

Q. Okay. Have you ever told anybody else something different than what you've said today?

A. Yes ma'am.

Q. Oh. Why did you do that?

A. I don't know. I don't even know the name I told. I don't even

[81]

know what I told them.

Q. Now, what you told me, Nicole, and what you told these ladies and gentlemen here is that what you've told them today was the truth because you didn't want God to get mad at you, right?

A. Yes ma'am.

Q. Okay. But just a second ago you told me that you told someone else that is not here right now a different story. Is that so? Isn't that what you just said, sweetheart? Didn't you just say that you told somebody else a different story?

A. (witness nods affirmatively)

Q. Okay. Did you say yes? Is that what you're trying to say?

A. (witness nods affirmatively)

Q. Oh, okay. Well, who did you tell the different story to? You know, Nicole. You know who you told, honey.

A. Uh-uh.

Q. Of course you do. You're seven years old, sweetheart. You told us all what happened. You done a real good job. Now, why won't you tell me who you told the other story to. Everybody wants to know, honey. Everybody in this courtroom wants to know. That's why we came here today.

A. Tasha.

Q. You told Tasha. Who's Tasha.

A. She goes to Belmont.

Q. She goes to Belmont?

A. She's my big sister's friend.

Q. And you told her a different story, huh?

[82]

Q. Well, did Tyronda tell you to tell her that?

A. (witness nods negatively)

Q. She didn't? Who told you to tell her a different story?

A. Nobody.

Q. Then why did you tell her a different story?

The Court: What did you tell her?

Q. What did you tell her?

The Court: Nicole, you promised to tell us the truth. What did you tell Tasha?

A. I told her I had some pickles.

Q. You told us that today. You said you ate a pickle.

A. That's all I told her.

Q. That's not different from what you said today, is it?

A. I don't know.

Q. You don't know. Well, you told these ladies and gentlemen that you wanted a pickle and Sergio gave you one and you ate it and it was real good. If you told Tasha that, that's the same thing, isn't it? Are you sure you didn't tell somebody else besides Tasha something different?

A. (No answer)

Q. You mean, Nicole, if one of these ladies back here were to come in here today when you're not in here and tell these ladies and gentlemen you said something different that that wouldn't be true? They'd be telling a lie then? You know what you told them, honey. What did you tell them? Did you tell them the same thing or something different?

A. (No answer)

[83]

Q. Why are you so quiet now? If you told somebody something different, honey, it would be a lie, wouldn't it, and that might get you in trouble with the man upstairs,

with God, mighten it? Are you afraid to admit that you told somebody a lie?

A. (No answer)

Q. Honey, did you? Everybody wants to know. No one is going to get mad at you and get you in trouble, honey, but we need to know. It's very, very, very important. Do you understand, honey, that if you told a lie, just told a lie to somebody and you don't admit to it today that Sergio could get in a lot of trouble and go to prison and be locked up for a long time maybe because you told that lie. Do you want that to happen?

A. (No answer)

Q. Do you want that to happen, Nicole?

A. (No answer)

Q. You don't know?

A. (No answer)

Q. Do you want somebody to get hurt because you told a lie?

A. (nods negatively)

Q. You wouldn't? If you don't admit it, that's going to happen today, it might happen. Have you ever told anybody else, Nicole, something else besides what you told these people here today besides Tasha?

A. Huh?

Q. Have you ever told anyone besides Tasha something different than what you just told these people here?

[84]

A. (No answer)

Q. Now, you know whether you did or not. Honey, if you told a lie you ought to admit it because if you don't someone's going to get hurt very badly, they might. No one is going to do anything to you if you admit what you did, if that's what you did. We just want to know the truth, Nicole, that's all. It's very important, honey, very,

very important. Honey, if Kathy—you know who Kathy is, don't you? Now, you've talked to Kathy about this, haven't you?

The Court: Nicole, can you look at me? Nicole, are you okay? Do you want to take a little rest? Nicole, we're all your friends. Let's get Kathy in here. You want to go outside a minute with Beverly or Kathy?

(social worker comes in)

The Court: Make sure there's absolutely no discussion about the testimony in any respect.

(At this time the Court admonishes the jury not to discuss the case and dismisses them for lunch recess)

Mr. Rogers: We have another young witness I think the Court may want to interview.

The Court: Who?

Mr. Rogers: His name is Eric Tandy.

Mr. Embry: How old is he, Pete?

Mr. Rogers: I believe he's five. Well, they have to waive

[85]

it.

Mr. Embry: I don't know that I want to do that. Pete, I'm going to ask the judge to have his mother be out of the courtroom when he testifies. I don't want any undue influence by her upon him what he might say.

Mr. Rogers: She's not a witness.

Mr. Embry: Well, then, I'll call her as a witness.

Mr. Rogers: That'll be fine.

The Court: Are you going to put Tyronda or Nicole back on?

Mr. Rogers: Yes, I guess. I don't know. I don't think I'll put Tyronda back on. I'll put Nicole back on.

Mr. Embry: Judge, was there some admonishment to the social workers and such over lunch not to discuss it with the children?

The Court: Yes. No discussion of anything that went on in here or any testimony period.

Mr. Embry: Is there any way there could be arrangements made that they could be in the care of someone not involved in this case. That just bothers me.

The Court: I understand that. I'll consider that an objection on the record. I'll overrule it. We'll just have to ask the social worker if any discussion was had. I certainly take Kathy Ghigliotty or Beverly Cummings word on it.

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[127]

PAULINE NICOLE GRIFFIN: Having been already duly sworn, testified as follows:

Direct Examination by Mr. Rogers:

Q. Nicole, you know when Christmas is, don't you?

A. Yes ma'am.

[128]

Q. Did this—was Sergio's birthday before Christmas?

A. Yes ma'am.

Q. Do you know when Thanksgiving is?

A. No ma'am.

Q. Do you know when Halloween is?

A. I don't know.

Q. Did this happen before Halloween?

A. Yes ma'am.

Q. Do you remember what he did to you? Can you tell us what he did?

A. I done told y'all.

Q. Well, we think you have but there's been some confusion. If you could just tell us again, we'd appreciate it. If you can't, that's okay. Can you tell us?

A. I can't.

Mr. Rogers: No further questions.

The Court: Mr. Embry.

Mr. Embry: Judge, I don't have any questions.

The Court: Thank you, Nicole.

* * * * * * *

[167]

Testimony for the Defendant

SERGIO STINCER: After being first duly sworn, testified as follows:

[168]

(Interpreter is sworn)

Direct Examination by Mr. Embry:

Q. Sergio, would you state your name for the Court, please?

A. My name?

Q. Uh-huh.

A. Sergio Stincer.

Q. Sergio, where were you born? Where were you born?

A. Cuba.

Q. Cuba. How long did you live in Cuba?

A. My life.

Q. When did you come to the United States?

1980. 1980.

Q. 1980. So you've lived here for about three years?

A. No. Close about four years.

Q. Almost four years?

A. Yeah. Close to four years.

Q. Where abouts have you lived here in the United States? What cities have you lived in?

A. When I come to America I lived in Miami, Florida. Okay, I went to Tampa. After Tampa, I went to Tennessee. In a little while I move to—I can't remember what the name is.

Interpreter: He has been to different cities

[169]

He doesn't know the name of all of them.

Juror: I can't understand you, ma'am.

Interpreter: He has been to several cities. He doesn't recall the name of all of them but he has been in different cities in the United States.

Q. Why did you come to the United States, Sergio?

A. Well, they have long time, you know, I see a paper, you know, newspaper and I watch T.V. in my country. I listen when my country talk about America. I like to know what America look like, you know. Some people in my country, you know, told me about America.

Interpreter: In different words. I wanted to—I just knew about what is America. I listened at radio about two or three months before coming to America about Castro, the president of Cuba and he say he open the door—

Interpreter: —at the American Embassy. I listened and therefore I think a house by myself. Now, I want to see what America look like and everything my country say. I can see everything by myself because some people say bad about America, some people say good, some people say yeah, you know, and I like to know by myself because I can't believe in everything I see in the paper. I can't believe in everything that he say. You can say what you want to say.

Mr. Rogers: Your Honor, this is not responsive, I don't believe, to the question. I don't see how

[170]

its really relevant.

The Court: I agree with you. If you're making an objection it's sustained.

Mr. Rogers: Yes sir, I am.

Mr. Embry: Your Honor, I'm really just trying to let the jury know something about Mr. Stincer. I'll try to make him be responsive to my questions.

The Court: Let's get on with it.

Q. Have you worked here in the United States, Sergio?

A. Yes sir.

Q. What have you done?

A. Well, a long time now. You talking about a long time or right now?

Q. Recently or—?

A. When I come to America I work—four years I live in America I work anytime.

Q. You worked various times?

A. Yes sir.

Q. What jobs have you done?

A. Interpreter: Carpenter work. As a carpenter he fixed houses. Welding. He worked as a welder in Florida.

Q. How long have you lived here in Hopkinsville?

A. I can't say. I would guess about two years.

Q. Sergio, do you remember your birthday last year in

[171]

1983?

A. Yes sir.

Q. Would you tell the ladies and gentlemen of the jury what happened on your birthday?

A. Well, you know, it's hard to say, you know.

Interpreter: He started out by saying he doesn't know what he can say because he doesn't know anything about it. The only thing he can tell you is that they left the kids with him and he took care of them and nothing happened until he returned them to Bonita.

Q. In other words, though, that day, Sergio, when you were alone with the children, you've heard what the different people have said the children claimed you did. Did you do any of those things that they said that you did?

A. No.

Q. Did you ever put your penis in any of the children's mouths?

A. For what, what reason?

(Interpreter tells witness question)

A. No.

Q. So you did not do that?

A. No.

Q. Did you-all play some games or have a good time?

A. Yeah, we play games.

[172]

Q. Why do you think the children might have said that you did these things?

A. I can't tell you because I listen—

Interpreter: He says he has heard many different stories and he doesn't know why there are several different stories and he says none of them are true.

I know only I listen about the stories. The 14th, my birthday, a Saturday morning, my girlfriend go to work. She left the kids with me at the house. Maria Griffin was with me at the house then. About twelve o'clock, you know, eleven-thirty, twelve, I fix the lunch for the kids plus Maria

told me I can take the kids to Bonita's house. I say okay. After that, me and Maria talk about where we going. I say I'm taking the kids to Bonita's house. I change their clothes and take the kids to Bonita's house. I talk to Bonita. She can't do it for me. She don't want to do.

(Juror asks that witness' answer be interpreted and reporter reads back answer)

I change their clothes when Maria told me they take the kids to Bonita's house because we go to Ft. Campbell.

Q. Sergio, was this on your birthday or later?

A. No. Saturday. My birthday.

Q. The next day?

A. Yes, Saturday.

[173]

Q. So you and Marie were going to Ft. Campbell?

A. Yes sir.

Q. And you took the children to Bonita's house?

A. Yeah. She's been my girlfriend through eleven months. I would come to a home and get it that Maria cleans and take her to Bonita's house and Maria worked for me at my house. She don't go with me.

Q. Did you tell Bonita you were going with Marie?

A. Uh-uh, no. I don't tell her.

Q. Did she see you and Marie together?

A. Well, when Maria told me to take the kids over to Bonita's house, Bonita asked me where she is. I say I don't know.

Q. Does she and Marie not get along?

A. Interpreter: He says they're like cats and dogs.

Q. When Bonita saw you and Marie together after you had taken the children, did she get mad at you?

A. Well, yeah.

(Answer not understood. Court requests repeat. Counsel asks question again)

A. Uh-huh, yeah.

Q. Did she talk loudly to you?

A. Yeah. She hollered at me.

Q. And you had told her earlier you weren't going to be with Marie. Is that so?

[174]

A. Yeah. I tell her how, you know, I don't go with Maria. I lie to her, you know. When she see Maria she say why you lie to me, you say you don't know where Maria and you left the kids to my house, you know. After that, she talk loud to me.

Q. This was after your birthday but before you got arrested. Is that so?

A. Yeah, just about. I can't say, you know, exactly. (phonetic)

The Court: What's that answer?

Interpreter: He wants you to repeat the question.

(Reporter reads back question)

Q. When Bonita got mad at you, it was after your birthday? (Counsel asks question in Spanish)

The Court: Mr. Embry.

Mr. Embry: Sorry, Judge, I got carried away.

Q. After your birthday before you were arrested, right?

A. She mad with me Saturday about 1:30, something like this. I'm going to Ft. Campbell with Maria Griffin.

Mr. Embry: (to interpreter) Do you understand what I'm asking him, Bonnie. Ask him if this incident with Bonita was after his birthday party?

Interpreter: It was after his birthday party.

Mr. Embry: (to interpreter) But before he

[175]

got arrested?

A. No, no, no. She mad with me before police come to my house.

Q. That's what I was trying to say, okay.

A. She mad with me Saturday. (phonetic)

Q. She got mad at you on Saturday. What day, then, were you arrested?

A. Oh, a long time.

Q. It was a while after that?

A. Yeah, a long time.

Q. Do you think that Bonita had reasons to want to get you in trouble?

A. Maybe, yeah, maybe no. I cannot say.

Q. You can't look into her mind?

A. Yeah. I can't read her mind.

Q. But would there have been reasons for her to have been mad at you? Could she have had some motive?

A. I have to say—well, yeah because . . . (phonetic) . . . about Maria say and about I say never, you know. I messing around with her a long time.

Q. With Bonita?

A. With Bonita and with Mary Tandy too.

Q. At the same time?

A. Yes sir.

Q. But then finally you moved from Bonita and lived with

[176]

Mary. Is that right?

A. Yes sir. Same thing.

Mr. Embry: That's all the questions I have for right now.

The Court: Mr. Rogers.

Mr. Embry: He will ask you questions, Sergio.

Mr. Rogers: May I approach the bench?

(At the bench)

Mr. Rogers: I'd like to have a *Cotton* hearing.

The Court: Are you entitled to one?

Mr. Rogers: I think so before I cross-examine him.

The Court: Do you have reason to believe that we need a *Cotton* hearing?

Mr. Rogers: I don't know. The man says he came from Cuba. They have released a lot of felons down there.

Mr. Embry: Your Honor, as long as he doesn't mention that. If he just wants to ask him, I don't have any problem with that. I've asked Sergio myself but he's welcome to do it if he'd like to.

The Court: Are you saying he can ask the question?

Mr. Rogers: I don't want to ask him if he doesn't have any.

[177]

Mr. Embry: Well, that's all I'm saying to you, Pete. If you want to ask him what I've ask him, that's fine or we can have a *Cotton* hearing, Judge. Maybe that would be more proper.

(At this time the jury is admonished not to discuss the case and is dismissed for a recess).

In-Chambers Hearing:

The Court: All right, Mr. Rogers, you've requested it.

Mr. Rogers: Yes sir. I'd just like to examine the defendant. The defendant is still under oath. Have you ever been in jail? Were you ever in jail in Cuba?

Mr. Stincer: The first time, one time, a year ago I say I'm not going to Army. If you don't go to Army, you have to go to jail.

Mr. Rogers: That's a felony.

Mr. Embry: Yeah, but it doesn't involve dishonesty.

Mr. Rogers: You weren't ever in prison while you were in the United States except this time. Is that right?

Mr. Stincer: Never. Never.

[178]

Mr. Rogers: And you stayed in jail in Cuba because you wouldn't go to Army. Is that right?

Mr. Stincer: Yes sir. You have to go in the Army or you have to go to jail.

The Court: How long were you in jail?

Mr. Stincer: Well, I stayed about a month, you know, something, a month.

Interpreter: A few months.

Mr. Rogers: That's all I have.

The Court: Take Sergio back out, please. Let's stay in here on the record. Are you going to try and impeach him with that?

Mr. Embry: I don't believe it would be competent.

The Court: Well, he's not going to so I don't have to rule on it.

(Off the Record)

Open Court

Cross-Examination by Mr. Rogers:

Q. How old are you, sir? How old are you?

A. Twenty-seven.

Q. How long have you been in the United States?

[179]

A. Close about four years, close.

Q. Now, your birthday is on October 14th?

A. Yes sir.

Q. What did you do that day?

A. Well, I just sitting there and my girlfriend asked me about going to the store and buying a cake.

Q. Who was your girlfriend?

A. Mary Tandy.

Q. Mary Tandy?

A. Yes sir.

Q. And her friend was Marie Griffin. Is that right?

A. Yes sir.

Q. At one time you used to live in the same apartment house?

A. Yes Sir.

Q. You never lived with Marie Griffin, did you?

A. No. By myself, never.

Q. You lived with Mary Tandy when you lived in the same apartment house with Marie Griffiin?

A. Before.

Q. Yes.

A. Before, yes.

Q. And on your birthday this past October you were living with Mary Tandy. Is that right?

A. Yes sir.

[180]

Q. And that's on Broad Street?

A. Yes.

Q. Did you have your clothes there at the house?

A. Yes.

Q. And you slept in the same room with her?

A. Yeah.

Q. What time did you get up that day? Do you remember? Do you remember what time you awoke?

A. My birthday?

Q. Yes.

A. My birthday.

Interpreter: He says he got up early.

Q. What time did the Griffin children come to the house?

A. Well, I go to she house Friday morning. I start driving around and see my friends and my girlfriends, you know, messing around.

Q. Who is your girlfriend?

A. Well, I have many. I can't tell you how many I got. I have to say how many I got. What are their names.

Q. You tell me. Can you tell me?

A. Yeah, I can tell you. I can show you everywhere.

Q. How many girlfriends do you have?

A. Ooh, I forgot, I forgot.

Q. You forgot?

A. Yes sir.

[181]

Q. Did you have more than three?

A. Yes, yes, more than three. I can show you ten girlfriends.

Q. Ten girlfriends?

A. Yeah.

Q. I'm talking about in Hopkinsville. In Hopkinsville how many girlfriends?

A. Too many girlfriends. I have too many, too many of them.

Q. Too many.

A. Too many, yes sir.

Q. And did you have other girlfriends when you were living with Mary Tandy?

A. Yes, sir.

Q. How many girlfriends did you have at that time on October 14, 1983?

A. Well, she see me for two girlfriends. (phonetic)

Q. Mary Tandy caught you in bed? Is that what you said?

Mr. Embry: Your Honor, I don't think this is relevant.

A. Not at her house, uh-uh. Not at she house.

The Court: What is the question and answer, Mrs. Higgins.

Mr. Rogers: Your Honor, I asked him what he was doing that day. I understood him to say that

[182]

he was riding around town seeing other girlfriends. Is that right?

A. Yes sir.

The Court: That much of it is right. That's my understanding too. That is correct.

Q. I wanted to know how many girlfriends he had.

A. I'll tell you how many I have.

Q. How many?

A. Too many.

Q. One can be too many.

A. I can show you everywhere.

Mr. Embry: Your Honor, once again I question the relevancy of how many girlfriends he has.

The Court: Overruled.

Q. What time did you get back to Mary Tandy's house?

A. When?

Q. On your birthday.

A. I had come to Mary's house at about afternoon. I can't say exactly what time. I can say afternoon, one o'clock, two o'clock, three o'clock.

Q. Do you know these children that testified here today, Nicole Griffin, Tyronda Griffin?

A. Yeah. I knew them about one year, something like that, a long time.

Q. You knew them for a year?

[183]

A. One year.

Q. And were they at home when you got back?

A. I go to house of Maria. I messing around, I go to Maria's house and tell her come out with me and I take Maria with me and go to my house.

Q. So you went to Marie Griffin's house that day?

A. Yeah.

Q. You are the one that brought the children over to the house. Is that right?

A. Yes sir. Uh-huh.

Q. What time of day was that?

A. Well, it was afternoon. I leave in the morning, you know, I'm messing around. Any time I go to the house of Maria because we close like sisters and brothers, you know, any time I'm at Maria's house and I tell her come to my house, you can help me.

Q. You and Maria were friends then?

A. Yeah. We like sister and brother more than friends.

Q. Did you have anything to drink that day?

A. No sir.

Q. You didn't drink anything?

A. No, no, no.

Q. On your birthday you didn't have any wine?

A. You want I tell you what? About nine o'clock

[184]

something like that, you know, I can't say, three hours, something like say eleven o'clock when we put a leaf in the table, you know, and we got about two or three people and

I leave from my house. I'm taking with me that long. I like a glass of liquor with me in my car, okay? I go to Bonita's house—.

Q. Wait just a minute. Let's back up a minute. Just answer my questions. Did you have anything to drink that day?

A. No sir.

Q. When you were riding around talking to girlfriends you didn't have anything to drink?

A. I had one glass in my car.

The Court: (to interpreter) Ask him that question.

(Interpreter asks witness question)

A. No nothing, nothing in evening, nothing in morning, nothing.

The Court: Ask him what this means? (motioning)

(Interpreter asks witness)

Interpreter: A glass.

The Court: A glass of what.

Q. What did you have in the glass?

A. I had a drink in the glass.

Q. A drink?

A. Yes sir.

[185]

Q. What kind of drink?

A. I drinking A & G.

Q. A & G, is that a wiskey?

A. I think so.

Interpreter: He says he didn't pay any attention because he doesn't drink a lot.

So you did have something to drink that day?

A. No sir.

Q. You had a glass with wiskey in it?

A. You asking me?

Q. Yes sir. That's what I'm asking you.

A. Are you asking me what kind of drink? Are you asking me.

(Interpreter asks witness question)

A. I drink a little bit. I'm talking about a glass. When me and my girlfriend—about eleven o'clock, something like that, we started a little bit—talking—long night, long night.

The Court: Let's stop right here. Mrs. Higgins bring us up to date.

Interpreter: He began drinking a little bit at eleven o'clock at night.

Q. You're telling us that you rode around all day talking to girlfriends, this is your birthday and you didn't have anything to drink?

[186]

A. I don't drink.

Q. What were you wearing?

A. In the morning or afternoon or night?

Q. What were you wearing that afternoon?

A. I don't remember.

Q. Do you ever wear shorts?

A. Who?

(Interpreter interprets)

A. On my birthday?

Interpreter: Yes, he has shorts.

Q. Did you wear shorts on your birthday, sir?

Interpreter: He has shorts but he does not recall having worn them the day of his birthday.

Q. Mr. Stincer, did you ever have any of those children in your room, any one of those children in your room alone with you?

A. A long time ago about some time every weekend I keep the children.

Q. On your birthday did any of the children come into that room with you alone?

A. No sir. Because my birthday the kids played. I stayed in the living room and watch TV. The kids play in the living room, make lot of noise, you know.

Interpreter: He was paying a lot of attention to the television.

[187]

A. I tell the kids to go to their room and play and be quiet. After a little while we start playing karate.

Q. You were playing cards?

Interpreter: Karate.

Q. You were playing karate?

A. We play that. Any time we play we play karate.

Q. You never played a game where you put a mask or blindfolded the children?

Interpreter: He does not have the time to dedicate this type of activity to the children. He has so many girlfriends to whom he must dedicate his time.

Q. You never put a blindfold on any of the children?

A. No sir.

Q. Did you ever feed them any pudding?

A. Yes sir, chocolate pudding.

Q. You fed them chocolate pudding?

A. Yeah. I give them chocolate pudding.

Q. What kind of pudding was this?

A. Chocolate pudding.

Q. What kind. Do you know the brand name?

A. Chocolate pudding.

(Interpreter asks witness question)

A. I don't know. I can't say to you what kind. I say to you chocolate pudding.

[188]

Q. Did you make it?

A. No. I don't cook.

Q. Prepared pudding?

A. No. They come in a can, little bitty cans like this.

The Court: I think his answer is yes, prepared pudding.

Q. Do you remember giving any of the children some pudding on your birthday?

(Interpreter asks question)

Q. Do you remember whether you gave them any pudding that day?

A. Yes sir.

Q. You do remember giving them pudding?

A. Uh-huh.

Q. What else did you give them?

A. Nothing more.

Interpreter: There was only one can of pudding and they all had to share it.

Q. You didn't blindfold them and give them each a spoonful?

A. For what?

(Interpreter interprets)

A. No.

Q. You know little Eric, don't you?

A. Yes sir.

[189]

Q. Eric Tandy?

A. Yes sir.

Q. Eric was Mary's child, was he not? Is he not?

A. Yes sir.

Q. I gather from what you were saying before that you think that this other woman planted something in the minds of these children. Is that what you're trying to get us to believe?

A. Yes.

Q. What was her motive for that?

A. She lied to Maria. You understand?

Q. She's Maria's sister-in-law?

A. Yeah.

Q. Did I hear you say that she didn't like Maria. Is that right?

A. I could say that anytime.

Q. But she liked you, though, didn't she?

A. Who? Who like me?

Q. The other woman.

A. Yeah. She like me. I like she because I'm man, she woman. I go out with her.

Q. You went out with her too? Is that what you said?

A. Bonita?

Q. Bonita.

A. Too many times I go out with she.

[190]

Q. Too many times?

A. Too many times. One year. A long time. I don't want to mess with her. That's why she's asking me.

Q. But you had been going out with Bonita? She was one of your friends. Is that right?

A. Well, I can't say. We were messing around like a man and woman do in the house by themselves, what we do, you know. I can't call her friend. She not my friend. She not my girlfriend. I been messing around with her.

Q. Bonita wasn't your girlfriend?

A. No. Just we messing around.

Q. Just a friend?

A. Yes sir.

Q. You were messing around you say?

Interpreter: When he's saying they were just messing around I get the impression he's saying they were just friends, no male, female relationship.

A. Yeah. We like man and woman. We just a friend. You in your house, I in my house.

Q. She had no reason then to be mad at you?

A. Yeah.

Q. She had no reason to be mad at you, Bonita?

A. Yes, yes, she have reason.

Q. What was her reason?

A. One point I can say before my birthday two or three

[191]

years we talking about—a weekend we're messing around. We in here too long.

Q. I'm sorry. I don't understand.

The Court: Mrs. Higgins, why don't you find out and see if you can help all of the rest of us.

Interpreter: He says he and Bonita were living together for approximately a year and a half, messing around. She asked him if he wanted to marry her. He said he had to think about it because he has daughters in Tennessee because he thinks that if he's going to get married he would like to marry the mother of his daughters and return to Tennessee. After that she was going to give him the opportunity to think about it, otherwise, they could not be together any more. I'm not sure.

Q. This woman, Bonita, wanted to marry you. Is that right? That's what you're telling us?

A. Yeah. She asked me. I say no.

Q. Did you tell her you would not marry her?

A. No. No, no, no. I don't want to mess with her.

Interpreter: He doesn't want to marry her.

Q. So you told her that you didn't want to marry her?

A. I lie to her. I lie to she. I say, I have to think, you know. Give me time.

Q. And all this time you were living with Mary Tandy.

[192]

Is that right?

A. Yes sir.

Q. What did Mary think about this?

A. She was jealous and mad.

Q. I didn't understand.

A. Jealous.

Interpreter: She's jealous.

A. And mad.

Q. Oh, Mary was jealous.

A. She see me messing around with her.

Q. Marie was jealous—Marie Griffin was also jealous?

A. Maria Griffin was my friend.

Q. Marie Griffin is your friend?

A. Mary Tandy is my girlfriend. Mary Tandy is my girlfriend. Marie just my friend and Bonita is girlfriend.

Q. Then you had some other girlfriends, too many to mention? Is that right?

A. Yes sir.

Q. How long were you there with the children alone while all the women were at the grocery?

A. She leave about—she leave the house about three o'clock, I think. Something like that. I see something I like on TV. I was watching TV. I can't say exactly what time. I'm close about five-thirty, six o'clock, something like that, close like that.

[193]

Q. Where did they go? Did you know where they were going?

A. Who?

Q. Marie and Mary.

A. What she say to me, I'll be back, I'm going to the grocery store. I think she was going by there and there and there and there for me.

Q. Did you give her money to buy the groceries?

A. I'm broke.

Q. You're broke. But you never did go into any room with any of these children alone?

A. The children stayed by themselves playing. They first come and talk to me . . . (phonetic) . . . played karate. He come to me and asked to me about we could play a little while, you know, we started doing like we knew karate. I take him into a room and in the room we started to play.

Q. So you did go to your bedroom and play karate. Is that right?

A. No. We played in the children's room. We played karate.

Mr. Rogers: No further questions.

The Court: Mr. Embry.

Redirect Examination by Mr. Embry:

[194]

Q. Bonnie, let me have you ask him in Spanish and we'll try it that way. I think he's already answered this, but he did live with Bonita as his lover for a year and a half. Ask him if that's right?

A. Yes sir.

Q. Now ask him if it's not so that he left Bonita to go and live with Mary as her lover?

A. Yes sir.

Q. Now ask him if after he was living with Mary did he ever at times, though, kind of tell Bonita he might come back and live with her again sometime?

Mr. Rogers: Your Honor, that's a leading question.

A. Yes sir.

Mr. Embry: Judge, I'm doing the best that I can.

Testimony of Sergio Stincer

The Court: I don't see any way he can ask the question and get an answer any other way. Let's go ahead. Your objection is overruled.

A. Yes. Sometimes yes.

Q. But that he never did do that though?

A. No.

Mr. Embry: That's all the questions.

The Court: Mr. Rogers.

Mr. Rogers: No further questions.

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SUPREME COURT OF KENTUCKY

84-SC-496-MR

SERGIO STINCER - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Christian Circuit Court
Honorable Edwin M. White, Judge
(83-CR-219)

OPINION OF THE COURT BY CHIEF JUSTICE STEPHENS—REVERSING—Final Date August 7, 1986

Appellant was convicted by a jury in the Christian Circuit Court of sodomy in the first degree. He was sentenced to twenty (20) years imprisonment.

Of primary thrust on this appeal is appellant's contention that he was denied his right to confrontation, under the Sixth Amendment of the United States Constitution and Section Eleven of the Kentucky Constitution, when the trial court excluded him personally from a pre-trial hearing to determine whether the child prosecuting witnesses were competent to testify. We agree with appellant's argument and reverse on that ground.

Appellant was indicted in the Christian Circuit Court and charged with the first degree sodomy of an eight year old girl, a seven year old girl, and a five year old boy. During an in chambers hearing held prior to trial the

Commonwealth sought dismissal of the charge in regards to the five year old on the grounds that the child was incompetent to testify. After granting that motion, the trial court prepared to conduct a hearing to determine if the two remaining prosecuting witnesses were competent to testify. At that time appellant specifically voiced his desire to be present personally during the competency hearing. Over defense counsel's objection, the trial court overruled his request and excluded appellant from the hearing.

Kentucky courts have continually recognized the right of the defendant to be present at every phase of the trial. *Powell* v. *Commonwealth,* Ky., 346 S. W. 2d 731 (1961). In addition to the right of confrontation provided by the Sixth Amendment to the United States Constitution, the Eleventh Section of the Bill of Rights of the Kentucky Constitution guarantees the accused in a criminal prosecution the right to be heard by himself and counsel and to meet the witnesses (against him) face to face. The main purpose of the confrontation rule, under both the Sixth Amendment and Kentucky's Bill of Rights, is to ensure the defendant's right to cross-examine the witnesses against him at trial.

In this case there is no question that the competency hearing was a crucial phase of the trial and that appellant had the absolute right to be present and be represented by counsel. The determination of whether the child witnesses could testify was critical to the prosecution's case, as their testimony comprised the gravamen of the charges against appellant Stincer.

Unlike the situation presented in *Harris* v. *Commonwealth,* Ky., 285 S. W. 2d 489 (1956), where the accused waived his right to be present during the preliminary examination of proposed witnesses by his failure to assert the privilege, appellant Stincer vociferously requested to

be present at the hearing to assist his counsel with cross-examination of the prosecuting witnesses. Appellant clearly asserted and was denied his constitutional right to meet the witnesses face to face.

The Commonwealth maintains that it was not error for the prosecuting witnesses to be examined for their competency outside appellant's presence when appellant's counsel was present on his behalf. We are urged to adopt the proposition that the criminal defendant himself does not have the right to attend in chambers examinations held to determine the competency of child witnesses, *Moll* v. *State,* 351 N. W. 2d 639 (Minn. App. 1984). This we decline to do.

Previously this court held in *Thomas* v. *Commonwealth,* Ky., 437 S. W. 2d 512 (1969) and *Harris, supra,* that a criminal defendant's right to be present in person did not extend to the reception of "legal arguments." However, a preliminary hearing to determine the competency of a prosecuting witness to testify certainly can not be termed the reception of purely legal argument as discussed in *Thomas* and *Harris, supra,* and therefore we find those cases distinguishable and that general proposition inapplicable in this case.

A criminal defendant has the right to attend hearings to determine the competency of witnesses. The trial court's determination of whether the prosecuting witnesses could testify was pivotal. Because the children's testimony was sine qua non to the prosecution's case, appellant's trial might not have taken place had the trial court determined that the children were not competent to testify.

Although this court recognizes the problems and pressures encountered when dealing with child witnesses, when a defendant is placed on trial by the state for criminal conduct he is entitled to be present and to assist his counsel

at hearings to determine the competency of witnesses against him.

Appellant also contends that the trial court erred in refusing to direct a verdict of acquittal, in ruling that a four year old child witness was competent to testify and in allowing state social workers to care for the prosecuting witnesses during a trial recess. While none of these issues constitute reversible error, we shall briefly address each for purposes of retrial.

After carefully reviewing the testimony at trial, we determine that the trial court correctly found the evidence in the case to be sufficient to withstand a motion for a directed verdict of acquittal. At trial the child witnesses identified appellant and the acts perpetrated against them. Appellant was then accorded his right to cross-examine the witnesses. The evidence presented was clearly sufficient to withstand appellant's motion for a directed verdict of acquittal and it was not unreasonable for the trial court to do so. *Trowel* v. *Commonwealth,* Ky., 550 S. W. 2d 530 at 533 (1977).

Likewise, we find no merit in appellant's contention that the trial court erred in ruling that a four year old witness, Eric Tandy, was competent to testify. The trial judge is in the unique position to observe witnesses and to determine their competency. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. The trial court questioned Eric Tandy in depth and the record on appeal does not substantiate appellant's claim that the trial court's ruling was clearly erroneous.

Finally, appellant contends the trial judge abused his discretion by allowing state social workers to care for the child witnesses during a trial recess. Prior to placing the

children in the care of the social workers, the trial judge properly admonished the social workers to refrain from discussing the case during lunch with the children. Although this court does not condone or encourage this practice, as the record is silent on this issue, this court declines to speculate as to the effect of the social workers brief supervision of the children. We cannot hold the trial judge abused his discretion in permitting social workers to care for child witnesses during a luncheon recess.

We therefore reverse the judgment of the trial court on the ground that appellant was denied his right to confrontation by the trial court's ruling that he be excluded from a pre-trial competency hearing.

Stephens, C.J., Gant and Vance, JJ., concur. Stephenson, J., concurs in a separate opinion and is joined by Leibson, J. Wintersheimer, J., dissents in a separate opinion and is joined by White, J.

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SUPREME COURT OF KENTUCKY

84-SC-496-MR

SERGIO STINCER - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Christian Circuit Court
Honorable Edwin M. White, Judge
83-CR-219

CONCURRING OPINION BY JUSTICE STEPHENSON

I agree with the majority opinion. However, it should be extended so as to mandate that the competency-to-testify proceeding by the trial court be held in open court and before the jury. It is the province of the trial court to ascertain whether the child is sufficiently intelligent to observe, recollect, and narrate the facts and has a moral obligation to speak the truth. *Moore* v. *Commonwealth,* Ky., 384 S. W. 2d 498 (1964). However, this inquiry is important to the jury in evaluating the credibility of the child's testimony.

Further, I believe it highly improper in a hearing to determine competency to testify to inquire into substantive testimony, as was done here with one of the child witnesses. Conducting this hearing before the jury would eliminate the temptation to hear substantive testimony about the case.

Leibson, J., joins in this concurring opinion.

RENDERED: June 12, 1986
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SUPREME COURT OF KENTUCKY

84-SC-496-MR

SERGIO STINCER - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Christian Circuit Court
Honorable Edwin M. White, Judge
No. 83-CR-219

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I must respectfully dissent from the majority opinion because the right of confrontation was not violated when the defendant was excluded from the competency hearing prior to trial. The majority decision misapplies and over extends the right to confrontation.

There never was at common law any recognized right to an indispensable thing called "confrontation" as distinguished from cross-examination. *See* Wigmore on Evidence § 1397 (Chadbourn Revision 1979).

The in-chambers hearing to determine the competency of child witnesses is not a critical stage of the proceedings related to the ultimate question of innocence or guilt. The competency determination is one which rests in the discretion of the trial judge. It is the responsibility of the trial judge to examine the witness to ascertain capacity.

See Muncie v. *Commonwealth,* 308 Ky. 155, 213 S. W. 2d 1019 (1948). Reserving discretion to the trial judge to exclude the defendant does not interfere with the right of the accused to confrontation because if the child witness is determined to be competent, the defendant will have an ample opportunity to fully assist counsel in the right of cross-examination in open court before the jury. A defendant does not have an absolute right to attend the proceedings when his presence would be useless or the benefit but a shadow. *See Snyder* v. *Massachusetts,* 291 U. S. 97, 105-06, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934).

It should be recognized that many children as well as adults are intimidated by the technical legal process. I agree with the Minnesota Court of Appeals when it said that children of sexual abuse have enough difficulty testifying in open court without the added burden of the possibility of an in-chambers intimidation factor arising from the presence of the defendant. *See Moll* v. *State,* Minn. App., 351 N. W. 2d 639 (1984).

In addition to consideration of fairness to all, the burden of the young sex victims should be made lighter and not more onerous, not only to insure that the abusers are fully prosecuted but to aid in the victim's recovery from this traumatic experience. *Moll, supra.*

In *State* v. *Braggs,* Tenn. Crim. App., 604 S. W. 2d 883 (1980), it was held that an examination of a child outside of the defendant's presence was harmless error. In that case, defense counsel was allowed to question the child in open court concerning her competency. Here, defense counsel examined the children as to their competency before the jury.

Section 11 of the Kentucky Constitution permits an accused to meet the witnesses face-to-face. The principal

purpose of the confrontation rule is to insure the right of cross-examination and to protect the defendant from conviction by means of ex parte testimony given in his absence. *See Harris* v. *Commonwealth,* Ky., 315 S. W. 2d 630 (1958). The witness confrontation rule concerns the method by which evidence is presented to the jury during the trial.

The essential purpose of the right of the accused to confront the witnesses against him is to secure the opportunity of cross-examination which cannot be had except by the direct and personal putting of questions and the obtaining of immediate answers. This right is basically a trial right and includes the right to cross-examine and the right of the accused to have the trier of fact weigh the demeanor and credibility of the witnesses against him. See 21A Am. Jur. 2d §720 *Confrontation, Criminal Law;* Wigmore on Evidence § 1395 et seq., *Purpose and Theory of Confrontation.*

The common law right to confrontation is not without certain well recognized exceptions. Such exceptions may be enlarged from time to time if there is no material departure from the reason underlying the constitutional mandate guaranteeing to the accused the right of confrontation.

The right to be confronted by the witnesses relates only to the actual trial for the commission of the offense. A witness's testimony from a prior preliminary hearing may be admissible against the defendant provided the confrontation clause of the Sixth Amendment is not violated. *See* 21 Am. Jur. 2d § 723.

The presence of the accused is not necessary during preliminary proceedings which do not affect the question of his guilt or innocence. *See Harris* v. *Commonwealth,*

supra; Hoskins v. *Commonwealth,* 188 Ky. 80, 221 S. W. 230 (1920).

The purpose of a competency hearing is to determine the appropriateness of the testimony from a witness who is under some disability. Such a hearing does not directly relate to the innocence or guilt of the accused but only to the propriety of admitting the testimony of a witness to the jury. The jury is the trier of the ultimate fact of innocence or guilt.

It is a maxim of Kentucky law that the courts must be careful to preserve the right of a defendant to be present at every stage of the trial, beginning with the swearing of the jury and ending with the return of the verdict. Obviously, the defendant is not entitled to be in the jury deliberations, consequently there are other proceedings which he may not be entitled to be present. The better definition of this marvelous legal phrase is that the defendant is entitled to be present at all phases of the trial which have a direct relationship to a determination of guilt or innocence by the trier of fact.

Clearly the jury as trier of fact witnessed both the direct examination and the cross-examination. They were able to reach a verdict based on the evidence presented to them. It is not appropriate that this Court disturb that verdict. There is no demonstration of prejudice to the accused in this case.

The Sixth Amendment to the Federal Constitution adopted in 1787 requires that in criminal prosecutions the accused shall have the right to confront the witnesses against him. Kentucky, as well as almost every state in the nation, has a similar provision. If literally applied, such requirements would prevent entirely the use for the prosecution of former testimony, dying declarations, public

records or other evidence coming under the traditional exceptions to the hearsay rule. They have not been literally applied.

In the late 1700's when these provisions were first included in the American Bill of Rights, the general rule against hearsay had been accepted in England for a hundred years, but it was equally well established that the former testimony taken in the presence of the accused and subject to cross-examination was received against him if the witness was dead or unavailable. It seems very probable that the purpose of the American provisions for confrontation was to guarantee the maintenance in criminal cases of the hard-won principal of the hearsay rule without abandoning the accepted practice of using former testimony given subject to cross-examination. It forbade the practice of using depositions taken in the absence of the accused which had been much complained of and was later abandoned by the English system and forbidden by statute.

As stated by Justice Cardozo in *Snyder, supra,* at page 682, "A fertile source of perversion in constitutional theory is the tyranny of labels." The phrases "right to confrontation" and "right to be present at every stage of the trial," must be applied in such a way as to produce a fair result. The right to be present and the right to confront does not confer a right to intimidate. It is the duty of the court to balance the rights of the accused with those of the victim. I believe that the sound discretion of the trial judge is the best barometer to determine fairness. A competency examination of a child witness is within the particular responsibility of the trial judge. In the absence of abuse of discretion or prejudice to the accused, I believe a reviewing court should not disturb the decision of the trial judge. Consequently, I would affirm the conviction.

White, J., joins in this dissent.

SUPREME COURT OF THE UNITED STATES

No. 86-572

COMMONWEALTH OF KENTUCKY, - - - *Petitioner*

v.

SERGIO STINCER, - - - - - - *Respondent*

On Petition for Writ of Certiorari to the Supreme Court of the State of Kentucky:

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted.

December 8, 1986

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
JAN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-572

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

COMMONWEALTH OF KENTUCKY - - Petitioner

versus

SERGIO STINCER - - - - - Respondent

On Writ of Certiorari to the Supreme Court of Kentucky

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Petition For Certiorari Filed October 6, 1986
Certiorari Granted December 8, 1986

QUESTIONS PRESENTED

I. Whether the Supreme Court of Kentucky misconstrued the Scope and Application of the Confrontation Clause of the Sixth Amendment.

II. Whether, assuming a violation of the Confrontation Clause of the Sixth Amendment in excluding the respondent from a child witness competency hearing, the Kentucky Supreme Court erred by its failure to consider whether the violation was harmless.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES .....iv–vii

OPINIONS BELOW viii

JURISDICTION viii

CONSTITUTIONAL PROVISIONS INVOLVED .. ix

STATEMENT OF THE CASE 1– 9

SUMMARY OF ARGUMENT 9–12

ARGUMENT 12–38

I. The Supreme Court Of Kentucky Misconstrued The Scope And Application Of The Confrontation Clause Of The Sixth Amendment 12–32

A. The Right To Be Present Under The Confrontation Clause Is A Trial Right; It Does Not Extend To Preliminary Proceedings 14–18

B. Stincer's Absence From The Competency Hearing Did Not Violate His Right To Be Present Under The Confrontation Clause ...18–23

C. Stincer's Absence From The Competency Hearing Did Not Violate Due Process 23–24

D. A Balancing Of Interests Weighs In Favor Of Kentucky And Furthers The Mission Of Confrontation 24–29

E. Jurisdiction 29–32

II. Assuming A Violation Of The Confrontation Clause Of The Sixth Amendment In Excluding The Respondent From A Child Witness Competency Hearing, The Kentucky Supreme Court Erred By Its Failure To Consider Whether The Violation Was Harmless 32–38

PAGE

A. Stincer's Interest In Attending The Competency Hearing Was Minimal And Conflicted With Compelling State Interests 33–34

B. There Was No Restriction On Cross-Examination 34–35

C. This Court Has Repeatedly Rejected Reversal Without Regard To Prejudice 36–38

CONCLUSION 39

TABLE OF AUTHORITIES

Cases:

PAGE

Barber v. *Page*, 390 U. S. 719 (1968) 15
Brown v. *United States*, 411 U. S. 223 (1973) 36
Caldwell v. *Mississippi*, 472 U. S. 320 (1985) 30
California v. *Carney*, 471 U. S. 386 (1985) 30
California v. *Green*, 399 U. S. 149 (1970) 17
Capps v. *Commonwealth*, 560 S. W. 2d 559 (Ky. 1977) 19, 20
Chapman v. *California*, 386 U. S. 18 (1967) 36
Commonwealth v. *Willis*, 716 S. W. 2d 224 (Ky. 1986) 19, 31
Davis v. *Alaska*, 415 U. S. 308 (1974) 35
Delaware v. *Fensterer*, 474 U. S. ___, 106 S. Ct. 292 (1985) 35
Delaware v. *Van Arsdall*, 475 U. S. ___, 106 S. Ct. 1431 (1986) 30, 34, 35, 36
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Estep v. *Commonwealth*, 663 S. W. 2d 213 (Ky. 1983) 32
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Gerstein v. *Pugh*, 420 U. S. 103 (1975) 17
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Hopt v. *Utah*, 110 U. S. 574 (1884) 13
Hoskins v. *Commonwealth*, 188 Ky. 80, 221 S. W. 230 (1920) 31
Illinois v. *Allen*, 397 U. S. 337 (1970) 13, 17, 30, 31

PAGE

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Michigan v. *Long*, 463 U. S. 1032 (1983) 29, 30
Moll v. *State*, 351 N. W. 2d 639 (Minn. App. 1984)..21, 26
Nelson v. *O'Neil*, 402 U. S. 622 (1971) 15, 17
Ohio v. *Roberts*, 448 U. S. 56 (1980) 15
Payne v. *Commonwealth*, 623 S. W. 2d 867 (Ky. 1981) 19, 20
People v. *Breitweiser*, 349 N. E. 2d 454 (Ill. App. 1976) 22
People v. *Garland*, 393 N. W. 2d 896 (Mich. App. 1986) 22
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Rushen v. *Spain*, 464 U. S. 114 (1983) 33, 36
Schneble v. *California*, 405 U. S. 427 (1972) 36
Scott v. *Commonwealth*, 616 S. W. 2d 39 (Ky. 1981) 30
Snyder v. *Massachusetts*, 291 U. S. 97 (1934) ....*passim*
State v. *Ritchey*, 490 P. 2d 558 (Ariz. 1971) 20
State v. *Sheppard*, 484 A. 2d 1330 (N.J. Super. 1984) 24, 28
State v. *Taylor*, 704 P. 2d 443 (N.M. App. 1985) ..20, 21
Stincer v. *Commonwealth*, 712 S. W. 2d 939 (Ky. 1986) .....*passim*
Taylor v. *United States*, 414 U. S. 17 (1973) 17
Tennessee v. *Street*, 471 U. S. 409 (1985) 14, 28
Thomas v. *Commonwealth*, 189 S. W. 2d 686 (Ky. 1945) 19
United States v. *Bagley*, 473 U. S. ___, 87 L. Ed. 2d 481 (1985) 36, 38
United States v. *Gagnon*, 470 U. S. 522 (1985) ..13, 14, 16, 18, 23

PAGE

United States v. *Hasting*, 461 U. S. 499 (1983) ..36, 37, 38
United States v. *Inadi*, 475 U. S. ___, 106 S. Ct. 1121 (1986) 29
United States v. *Lane*, 474 U. S. ___, 106 S. Ct. 725 (1986) 38
United States v. *Nobles*, 422 U. S. 225 (1975) 37
Wheeler v. *United States*, 159 U. S. 523 (1895) 20, 35
Whitehead v. *Stith*, 268 Ky. 703, 105 S. W. 2d 834 (1937) 19

Constitutional Provisions:

Sixth Amendment .....*passim*
Fourteenth Amendment .....*passim*

Statutes:

28 U.S.C. § 1257(3) viii
28 U.S.C. § 2111 38
Section 510.070, Kentucky Revised Statutes 1

Rules:

Supreme Court Rule 20.4 viii
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OPINIONS BELOW

The Supreme Court of Kentucky reversed the respondent's conviction in a published opinion on June 12, 1986 (rehearing denied August 7, 1986). *Stincer* v. *Commonwealth,* 712 S. W. 2d 939 (Ky. 1986) (Joint Appendix, hereinafter "J.A." 81-91). The judgment and sentence of the Circuit Court of Christian County, Kentucky, is also reproduced in the Joint Appendix (J.A. v-vi).

JURISDICTION

The Supreme Court of Kentucky reversed the judgment of conviction on June 12, 1986 (J.A. 81-91) and denied a timely petition for rehearing, filed on behalf of the petitioner, on August 7, 1986. On October 6, 1986, a timely Petition for a Writ of Certiorari was filed. Sup. Ct. R. 20.4. The Petition for a Writ of Certiorari was granted on December 8, 1986 (J.A. 92). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State, shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 86-572

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

SERGIO STINCER - - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR PETITIONER

STATEMENT OF THE CASE

A. Procedural History

Respondent Sergio Stincer was indicted on December 16, 1983 (Transcript of Record, hereinafter "TR" 6; J.A. iii-iv). It was charged that on the 14th day of October, 1983, Stincer committed three separate offenses of first degree sodomy, in violation of Kentucky Revised Statutes (KRS) Section 510.070, by having deviate sexual intercourse with three children incapable of consent, these being eight-year-old female T.M.G., seven-year old female P.N.G., and five-year-old male B.H., Jr. (J.A. iii). The charge involving the five-year-old boy was dismissed before trial at the request of the Commonwealth of Kentucky due to

reservations concerning the child's competency to testify (Transcript of Evidence, hereinafter "TE" 13-14; J.A. 1). Stincer was convicted and sentenced, as recommended by the jury, to a prison term of twenty (20) years on March 16, 1984 (TR 27).

B. The Child Witness Competency Hearing

In Kentucky, a pre-trial hearing is normally held to determine, as a preliminary matter, whether children are competent to testify. Such a hearing was held in this case (J.A. 1). At the beginning of the hearing, the trial court indicated that Stincer would be returned to the courtroom while the two children were examined (J.A. 2). Although Stincer's counsel had no problem with this, and correctly informed Stincer that the scope of the hearing would be merely to "talk to the children, not about the case really but just to see if they're old enough to understand the difference between telling a lie and telling the truth . . . ," Stincer apparently indicated that he desired to stay in chambers (J.A. 2).[1] To protect his client, counsel asked that Stincer be allowed to stay; this motion was overruled (*Id.*). Stincer was removed and the trial court and counsel proceeded to examine the

[1]In its Opinion in this case, *Stincer* v. *Commonwealth*, 712 S. W. 2d 939, 940-941 (Ky. 1986), the court stated that Stincer "vociferously requested to be present at the hearing . . ." (J.A. 82-83). Stincer's actual comments were unintelligible and were not reported. Defense counsel merely stated: "I guess what he's saying is, Judge, he wishes to be here" (J.A. 2). Although respondent spoke and could understand some English, an interpreter was used during the trial (TE 26-28 and J.A. 59-80).

potential witnesses. First to be examined was the eight-year-old female T.M.G. She stated her age, her birthday, the name of her school and teachers, and where she went to church and Sunday School (J.A. 2-3). When asked by the court if she knew what it meant to tell the truth, she replied that it meant "Don't tell no stories" (J.A. 4). She knew that telling a story would result in punishment and was wrong (J.A. 5).

T.M.G. withdrew and the second female witness, age seven, was brought in chambers. P.N.G. knew her age, the name of her school and teachers, and her favorite school subject (J.A. 6-7). Although not as articulate as her sister, P.N.G. knew that to tell the truth "means you love God" and that God would get angry if you tell a lie (J.A. 7). She knew that a lie would be "wrong," that a lie was not the truth, and that she would "get a whopping" if she lied and that God would be angry with her (J.A. 8-10).

Both child witnesses promised to tell the truth at trial (J.A. 4, 9). Both were cross-examined by defense counsel (J.A. 4-5, 9). No facts of the case or testimony were mentioned.[2] The trial court ruled that both child witnesses were competent to testify and defense

[2]During trial, an additional competency hearing was held concerning a four-year-old boy who had witnessed the incident (TE 87-109). Respondent either was present or made no request to be present — the record is silent and no issue was raised on appeal. It is to this hearing that Justice Stephenson refers when he criticizes questions on substantive testimony during a competency hearing. *Stincer* v. *Commonwealth*, 712 S. W. 2d at 942 (J.A. 86).

counsel had no disagreement with this preliminary ruling on competency (J.A. 6, 11).

C. The Trial

The case proceeded to trial. The evidence showed that on October 14, 1983, Marie Griffin took her children to the home shared by Sergio Stincer with Mary Tandy and her children at 1512 Broad Street, Hopkinsville, Kentucky (TE 130-131). Planned for that evening was a celebration of respondent Stincer's birthday. Around four o'clock the two women went to the grocery to buy food for the party and left their seven (7) children, including T.M.G. and P.N.G., in Stincer's care (TE 131-132). They were gone about an hour and a half (TE 131). When they returned they noticed nothing unusual; some of the children told their mother, Marie Griffin, that they had played a game while she was gone but did not, at this time, describe it (TE 133, 137). Over the weekend Marie Griffin took her children to stay at the home of her sister-in-law, Bonita Griffin (TE 133).

On October 27, 1983, the Kentucky Department of Human Resources branch in Hopkinsville received an anonymous telephone call that petitioner had been sexually abusing the Griffin children by "tying socks around these children's eyes and telling them they were sucking on pickles . . ." (TE 146). Minutes after the call two social workers went to Marie Griffin's home and discussed the allegations (*Id.*) They were allowed to interview the children separately without

the mother being present and confirmed the allegations (*Id.*). After the first social worker questioned T.M.G. and P.N.G. they were again questioned separately, and individually, by the second (TE 150, 159). Mary Tandy's children were interviewed the next day (TE 150). Although there were differences in the children's stories, the social workers testified that the stories didn't vary much and that the statements of the three Griffin children were consistent (TE 153, 161). One of the other children, eight year old S.T., had been threatened by Stincer not to tell about the incident (TE 153-154).

In testimony before the jury all three child witnesses were examined not only regarding the substance of the charges, but also regarding their competency (J.A. 11-13, 37-38, 41-42, 52; TE 110, 114-115, 122). T.M.G. was examined first. She answered questions regarding her name, age, school name and location, grade, teachers, home address, mother's name, birthday, and Sunday School (J.A. 11-13). She was also asked the meaning of telling the truth and the consequences of not doing so (J.A. 13). On cross-examination defense counsel asked T.M.G. if it would bother her to tell the jury a story, whether it was wrong to tell a story, and, again, whether God would "get mad" if she told a story (J. A. 37). The trial court asked her three times what would happen if she told a story and three times the witness responded "get in trouble" (J.A. 38). P.N.G. also answered questions about her name, age, and school (J. A. 41). On cross-examina-

tion she was again asked the consequences of telling a story (J.A. 52).

The young boy, E.T., was asked similar competency questions on both direct and cross (TE 110, 114-115, 122). No attempt whatsoever was made to limit Stincer's cross-examination before the jury regarding the competency of these witnesses.

All three child witnesses were in substantial agreement on the details of the offense itself. The first prosecution witness, T.M.G., testified that while the other adults were gone Stincer came and got her, put a dark sock over her eyes, put pudding in her mouth, and then put in his "d-i-c-k" (J.A. 13-14). Her testimony left no doubt that she knew what a "d-i-c-k" was (J.A. 14-15). This took place on Sergio Stincer's birthday, while her mother had "[g]one to get the present and going to get some balloons for us and got the birthday cake and stuff" (J.A. 15). She testified that she told her mother and Bonita Griffin, as well as the social workers, about the incident (J.A. 15-16).

On cross-examination T.M.G. was initially questioned about how long ago the incident was reported, how soon the police were called, how much time had elapsed after the incident before the social workers were called and who she told about this incident first, her mother, the social worker, or Aunt Bonita (J.A. 17-22). Defense counsel questioned her extensively on this peripheral issue and the eight-year-old witness became confused over who she had "told" first (J.A. 21-26). The witness became increasingly frustrated,

unresponsive, and scared (J.A. 23). She started to cry and the court took a recess (J.A. 34-35). After the break she refused to speak in answer to most of the questions, often nodding "yes" or "no," and again began crying (J.A. 36-40). She then became completely unresponsive and she was excused (J.A. 41).

P.N.G. next testified. She was scared, and hesitated to "[t]ell all these people" her story (J.A. 44). Nonetheless she identified Stincer and testified that on the day of Stincer's birthday he "put some pudding on his d-i-c-k and put it in my mouth" (*Id.*). Her nickname for d-i-c-k was "Ding-Dong" (J.A. 45). Like T.M.G., she stated that her eyes were covered by a red sock (J.A. 31, 43). She quickly became scared again on cross-examination (J.A. 49-50). However, she did relate that Stincer told her she could have a "pickle" to eat and that she ate it (J.A. 51). After numerous suggestions by defense counsel that she was not telling the truth the witness became unresponsive and was excused (J.A. 55-57).

A third prosecution witness, five-year-old E.T., was then examined in chambers and determined to be competent to testify (TE 87-109). In open court he verified that Stincer had put his dick in everybody's mouth after putting a sock over their eyes, and that Stincer gave him a "pickle" to eat (TE 112-113). It was a "[c]hocolate pudding" pickle (TE 113).

Sergio Stincer took the stand on his own behalf (J.A. 59). He denied doing any of the things the children said he did (J.A. 62). He denied putting his

penis in any of the children's mouths. (*Id.*). Stincer theorized that Bonita Griffin had put the children up to this because she was jealous (J.A. 65, 75). He had been "messing around" with both Bonita Griffin and Mary Tandy at the same time and finally moved in with Mary Tandy (J.A. 65). Stincer had "too many girl friends" and testified that he spent the morning of his birthday riding around town visiting them (J.A. 69-70). Stincer confirmed that he stayed with the children and fed them chocolate pudding (J.A. 74-75). His testimony differed from the children's only in his denial of blindfolding and sexually abusing them. The jury found Stincer guilty of one combined count of first-degree sodomy and sentenced him to twenty (20) years (TR 15). Sentence was imposed March 16, 1984 (J.A. v-vi).

D. Appellate Review

On March 26, 1984, Stincer filed his notice of appeal to the Kentucky Supreme Court (TR 30). The decision by the Kentucky Supreme Court overturning respondent's conviction became final on August 7, 1986. *Stincer* v. *Commonwealth,* 712 S. W. 2d 939 (Ky. 1986) (J.A. 81-91). Over two dissents the Kentucky Supreme Court held that a child witness competency hearing was a "crucial phase of the trial" at which the right of confrontation guaranteed respondent an "absolute right to be present" (J.A. 82). No harmless error analysis was attempted (J.A. 81-86). The judgment of the Christian Circuit Court was reversed (J.A. 85). Kentucky filed a timely Petition for a Writ of Certiorari on October 6, 1986. Certiorari was granted on December 8, 1986 (J.A. 92).

SUMMARY OF ARGUMENT

The Supreme Court of Kentucky misconstrued the Confrontation Clause of the Sixth Amendment and the precedents of this Court by guaranteeing a criminal defendant an absolute right to attend a preliminary hearing to determine the competency of the two young sex abuse victims. Respondent was represented by counsel at the hearing and had a full opportunity to confront the children at trial.

Confrontation is a trial right. It protects the right of presence when the defendant is actually confronting witnesses or evidence before the trier of fact. Outside of this limited context, presence is protected by due process when there is a reasonably substantial relation to the opportunity to defend or where absence might frustrate the fairness of the proceedings.

This Court's past decisions demonstrate the limited scope of the Confrontation Clause. Its mission is to "advance the accuracy of the truth-determining process" and to augment accuracy by ensuring an effective means to test adverse evidence. In contrast, the only issue at a preliminary competency hearing is the judge's determination of whether a child can be a competent witness. The hearing does not relate to the defendant or to the facts of the case.

In the present case the children were questioned in chambers before trial, with respondent represented by counsel. The children later testified in open court and no restrictions were placed on respondent's cross-examination. Confrontation was fully satisfied. The Supreme Court of Kentucky erred by fashioning from the Confrontation Clause a right to presence for presence's sake at a pretrial competency hearing.

The lower court did not decide whether there might have been a denial of due process, but it is apparent from the record and this Court's precedents that no such violation occurred. Respondent has not alleged and cannot show anything substantial that he could have done had he attended the hearing.

Should this Court decide that the Confrontation Clause extends to preliminary competency hearings, it must then balance the interests asserted by respondent and the state. A defendant's presence could contribute nothing to the judge's ability to assess the child's capacity to recall and narrate events or to distinguish between truth and falsehood. Nor is there any substantial relationship to his ability to defend. Stincer's presence could only have had the counterproductive effect of intimidating the child.

Kentucky, on the other hand, has compelling interests in the prosecution of child sexual abuse, which is usually a crime of seduction and betrayal of a child of tender years by a trusted adult. The child is traumatized at having to face the perpetrator again because of the abuse of authority, trust, and the fear of retaliation inherent in the crime. This trauma is compounded by repeated appearances. Public policy, as reflected by legislative reforms, strongly supports greater protection by the criminal justice system for this class of especially vulnerable victims. The state's interest in the accuracy of evidence is also enhanced by exclusion of the defendant from the competency proceeding. Fear or emotional stress produces unreliable evidence from child victims. An unnecessary pretrial confrontation, often in the close proximity of chambers, would increase stress and decrease the accuracy of testimony. For this reason, exclusion of the defendant does not violate the Confrontation Clause; to the contrary, it advances its very mission.

Moreover, it is apparent that this Court has presumptive jurisdiction to review the case at bar since the Kentucky Supreme Court advanced no adequate and independent state ground for its holding. Only recently, the Kentucky court held that the Kentucky Constitution's confrontation clause was "basically the same" as that in the Sixth Amendment. This conforms with Kentucky's longstanding practice of interpreting confrontation issues based upon federal case law. The consistent reliance of the Supreme Court of Kentucky on the United States Constitution when interpreting its own Constitution and rules of procedure demonstrates that the decision in the case at bar rests primarily on federal law and that there is no adequate and independent state ground.

Finally, assuming that this Court extends the Confrontation Clause to a child witness competency hearing, the Kentucky court erred by its failure to consider whether the violation was harmless. Respondent's interest in attending the hearing was minimal and was outweighed by the state interest in protecting the child witness from the increased trauma of repeated court appearances. Since only the child's competency was at issue, nothing in the hearing undermined the fairness and accuracy of the trial, where Stincer was free to cross-examine the child witnesses on any relevant issue including their competency or credibility. Because this Court has repeatedly emphasized that harmless error analysis is appropriate for most constitutional violations, and because respondent has never even argued, much less demonstrated, actual prejudice, this Court should hold that if error was committed it was harmless.

ARGUMENT

I.

The Supreme Court of Kentucky Misconstrued the Scope and Application of the Confrontation Clause of the Sixth Amendment.

The Supreme Court of Kentucky held that, under the Confrontation Clauses of the state and federal constitutions, an accused "had the absolute right to be present" at a "pretrial hearing to determine whether the child prosecuting witnesses were competent to

testify." *Stincer* v. *Comonwealth,* 712 S. W. 2d 939, 940 (Ky. 1986). Kentucky submits this holding erroneously extends the Confrontation Clause beyond its context of the trial when evidence and witnesses are presented to the trier of fact. This expansion of the Confrontation Clause is contrary to controlling precedents of this Court and conflicts with the reasoned decisions of other state courts. The Supreme Court of Kentucky erroneously transformed the right to confront into a right to intimidate, thereby defeating the very purpose of confrontation, which is to ensure the reliability of the evidence presented to the trier of fact.

Although there is no express guarantee of a right to presence at trial contained in the Constitution, this Court has frequently recognized the existence of such a right under specific circumstances. This right was originally said to be derived from either the Fifth and Fourteenth Amendment guarantees of due process of law or, somewhat later, from the Sixth Amendment guarantee of an accused's right to confront the witnesses against him.[3]

In *United States* v. *Gagnon,* 470 U. S. 522, 526 (1985), this Court noted that the right to presence is

[3]Compare *Hopt* v. *Utah,* 110 U. S. 574 (1884) [due process violation where absence from jury selection was not permitted under territorial statute]; *Dowdell* v. *United States,* 221 U. S. 325 (1911) [due process requires accused to be present at every stage of trial, but not when a record is certified for appeal]; and *Snyder* v. *Massachusetts,* 291 U. S. 97 (1934) [no due process right to accompany jury to view the scene of the crime], with *Illinois* v. *Allen,* 397 U. S. 337 (1970) [removal of disruptive defendant does not violate Confrontation Clause].

rooted in the Confrontation Clause but acknowledged protection by the Due Process Clause "where the defendant is not actually confronting witnesses or evidence against him." It now seems apparent, therefore, that the Due Process Clause of the Fifth and Fourteenth Amendments guarantees a right to be present only where there is a reasonably substantial relation to the full opportunity to defend against the charges or where the defendant's absence might frustrate the fairness of the proceedings. *Snyder* v. *Massachusetts,* 291 U. S. 97, 105 (1934); *Faretta* v. *California,* 422 U. S. 806, 819, note 15 (citing *Snyder*) (1975). The Confrontation Clause of the Sixth Amendment, on the other hand, has a much narrower scope. It guarantees a right to be present during trial when evidence and witnesses are being presented to the trier of fact. *Gagnon,* 470 U. S. at 526. Respondent did not argue, and the Supreme Court of Kentucky did not decide, whether his due process rights might have been violated. As discussed below, however, such an argument would have been without merit. Initially, Kentucky will demonstrate that the Confrontation Clause is not applicable; it will then address the relevance of any possible due process claim.

A. The Right To Be Present Under The Confrontation Clause Is A Trial Right; It Does Not Extend To Preliminary Proceedings.

The mission of the Confrontation Clause is "to advance 'the accuracy of the truth-determining process in criminal trials'." *Tennessee v. Street,* 471 U. S.

409, 415 (1985) [quoting *Dutton* v. *Evans,* 400 U. S. 74, 89 (1970)]. Its underlying purpose is "to augment accuracy in the fact-finding process by ensuring the defendant an effective means to test adverse evidence. . . ." *Ohio* v. *Roberts,* 448 U. S. 56, 65 (1980). The truth-determining process, during which guilt or innocence is at stake and during which the accused has a right to test the reliability of the evidence, includes only those portions of the trial where evidence is being presented to the trier of fact.

> "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."

Barber v. *Page,* 390 U. S. 719, 725 (1968); see also *Nelson* v. *O'Neil,* 402 U. S. 622, 626 (1971). In analyzing the concept of "trial" as applicable to the due process right of presence, and holding there was no denial of due process by excluding a defendant from a jury view of the crime scene, Justice Cardozo carefully explained in *Snyder* v. *Massachusetts,* 291 U. S. 97, 107 (1934) that:

> "The underlying principle gains point and precision from the distinctions everywhere drawn between proceedings at the trial and those before and after. Many motions before trial are heard in the defendant's absence, and many motions after trial or in the prosecution of appeals. [Citations omitted.] Confusion of thought will result if we fail to make the distinctions between requirements in respect of presence that have their source in

> the common law, and requirements that have their source, either expressly or by implication in the federal constitution. *Confusion will result again if the privilege of presence be identified with the privilege of confrontation, which is limited to the stages of trial when there are witnesses to be questioned.*" (Emphasis added.)

While recognizing that knowledge gained from a view of the scene may be characterized as "evidence," the Court rejected any claim that a view is a "trial."[4] Justice Cardozo then cautioned, "A fertile source of perversion in constitutional theory is the tyranny of labels." *Id.* at 114. The scope of the due process right of presence was described and limited as follows:

> "A defendant in a criminal case must be present at a trial when evidence is offered, for the opportunity must be his to advise with his counsel. [Citations omitted.] Let the words 'evidence' and 'trial' be extended but a little, and the privilege will apply to stages of the cause at which the function of counsel is mechanical or formal and at which a scene and not a witness is to deliver up its message." *Id.* at 114-115.

Recently, this Court again clarified the distinction between the right of presence secured by the Confrontation and Due Process Clauses. In *United States* v. *Gagnon,* 470 U. S. 522, 526 (1985) (per curiam):

[4] "The better definition of this marvelous legal phrase is that the defendant is entitled to be present at all phases of the trial which have a direct relationship to a determination of guilt or innocence by the trier of fact." *Stincer* v. *Commonwealth, supra* (Wintersheimer, J., dissenting) (J.A. 90).

> "The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, e.g., Illinois v. Allen, 397 U. S. 337 (1970), but we have recognized this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him."

In other words, the right of presence rooted *in the Confrontation Clause* is limited to those stages of trial where witnesses or evidence are being presented to the trier of fact.

Practical application of these principles by this Court has produced the following results: A defendant has a Confrontation Clause right to be present while the prosecution presents its evidence. *Illinois* v. *Allen,* 397 U. S. 337 (1970); *Taylor* v. *United States,* 414 U. S. 17 (1973). An accused has no confrontation right to discover an informant's identity during a supression hearing where the issue is the preliminary one of probable cause and the defendant's guilt or innocence is not at stake. *McCray* v. *Illinois,* 386 U. S. 300 (1967). The right to confrontation is not applicable to a limited function Fourth Amendment probable cause hearing which is non-adversarial in character; such a hearing is not a "critical stage" in the prosecution. *Gerstein* v. *Pugh,* 420 U. S. 103, 122 (1975). Admission of a witness' unsworn out-of-court statement does not deny confrontation when the witness is available at trial and subject to cross-examination. *Nelson* v. *O'Neil,* 402 U. S. 622, 626 (1971); see also *California* v. *Green,* 399 U. S. 149 (1970).

Nor is due process violated by exclusion of a defendant from a jury view, *Snyder* v. *Massachusetts,* 291 U. S. 97 (1934), or from a trial judge's meeting with only counsel present. *United States* v. *Gagnon,* 470 U. S. 522 (1985) (per curiam).

The Confrontation Clause provides an opportunity to test the reliability of evidence at trial before the trier of fact through cross-examination and jury observation of the witness' demeanor. It does not confer any right to pretrial discovery, to test the reliability of all potential witnesses in advance of trial, or to intimidate potential witnesses. The Confrontation Clause does not guarantee presence for presence's sake. The right to confront or to be present is ancillary to the right to test the reliability of evidence and thereby to advance the truth-seeking function. Outside of the limited scope of the Confrontation Clause, due process guarantees the right of presence when there is a reasonably substantial relation to the opportunity to defend; however, no decision of this Court "assures the privilege of presence when presence would be useless or the benefit but a shadow." *Snyder,* 291 U. S. at 106.

B. Stincer's Absence From The Competency Hearing Did Not Violate His Right To Be Present Under The Confrontation Clause.

Just as the Confrontation Clause does not extend to a Fourth Amendment probable cause hearing, nor to a suppression hearing where guilt or innocence is not at stake, nor to a jury view, it cannot logically apply to a preliminary hearing where the only issue

is the trial judge's determination of whether a child witness is competent to testify. In Kentucky, the standard for competency is whether the child is of sufficient intelligence to observe, recall and narrate facts, and has a moral sense of obligation to tell the truth. *Capps* v. *Commonwealth,* 560 S. W. 2d 559, 560 (Ky. 1977). Typical voir dire questions require recollection and narration of past facts such as home address, age, names of relatives, teachers, or acquaintances, school name, parents' employment, and the like.[5] Children are also asked their understanding of truth and whether they will tell the truth. In Kentucky, testimonial capacity depends upon individual capability rather than an exact age, but youthfulness will preclude a presumption of competency. *Merchant* v. *Commonwealth,* 140 Ky. 12, 130 S.W. 793 (1910); *Thomas* v. *Commonwealth,* 189 S. W. 2d 686 (Ky. 1945). Competency is a question for the court, not the jury, and the trial judge's decision will not be disturbed absent an abuse of discretion. *Whitehead* v. *Stith,* 268 Ky. 703, 105 S.W. 2d 834 (1937); *Payne* v. *Commonwealth,* 623 S.W. 2d 867, 878 (Ky. 1981). Kentucky law does not require any specific arrangement or procedure for the competency hearing. Reported decisions reflect a common practice of voir dire examination in chambers or otherwise outside the presence of a jury. *Commonwealth* v. *Willis,* 716 S. W. 2d

[5]Typically, in other jurisdictions the questions are limited to topics unrelated to the trial controversy. Comment, The Competency Requirement For The Child Victim Of Sexual Abuse: Must We Abandon It? 40 Univ. of Miami L.R. 245, 263 (1985).

224, 226 (Ky. 1986); *Payne, supra; Capps, supra; Hendricks* v. *Commonwealth,* 550 S. W. 2d 551, 554 (Ky. 1977). In the present case the children were questioned in chambers with respondent represented by counsel. No trial testimony was elicited; defense counsel was permitted to question the children as fully as he wished (J.A. 1-11).

A large number of states follow a similar approach based, as is Kentucky's, upon the principles announced by this Court in *Wheeler* v. *United States,* 159 U. S. 523, 524 (1895).[6] Competency hearings are automatic in these states. Other jurisdictions may presume competency but can hold a hearing if the child's capacity is questioned.[7] In addition to Kentucky, four state courts have considered the identical question of whether the Sixth Amendment was violated by holding a competency hearing for a child witness outside the presence of the accused. All four cases involved child sexual abuse victims. All four courts concluded there was no violation of the Confrontation Clause.

In *State* v. *Ritchey,* 490 P. 2d 558 (Ariz. 1971), the competency hearing for two girls, ages 4 and 6, was held in chambers with counsel present but the defendant absent. The court found no compelling need for a defendant to be present nor could the defendant show he was prejudiced. In *State* v. *Taylor,* 704 P. 2d 443, 446 (N.M. App. 1985), the magistrate ordered the de-

[6]Eastman and Bulkley, *Protecting Child Victim/Witnesses: Sample Laws and Materials* (Chicago: American Bar Association, 1986), 37, 45-46.

[7]*Id.,* 38-39, 43-44.

fendant out of the courtroom during a preliminary competency examination of a three-year-old boy. The court held that there was no violation of the right of confrontation and if there were any error, it was harmless beyond a reasonable doubt. *Id.* at 449.

The Minnesota appellate court considered claimed Confrontation Clause violations arising from exclusion of both the defendant and counsel from competency hearings of two girls, ages 4 and 6. *Moll* v. *State,* 351 N.W. 2d 639 (Minn. App. 1984). The intimidation of children by the courtroom environment was noted and the court found no violation of the defendant's confrontation right since any child found competent would be available for full confrontation at trial. The court also rejected due process claims. *Id.* at 644. Illinois similarly rejected confrontation claims in *People* v. *Breitweiser,* 349 N.E. 2d 454, 456 (Ill. App. 1976), where counsel was present at the seven-year-old boy's competency hearing, held *in camera* prior to the introduction of evidence, but the defendant was ordered to leave. In rejecting the defendant's claim of a "right to be present at all critical stages of the trial," the court said:

> "The purpose of such a preliminary hearing is not, as the defendant suggests, to cross-examine the witness so that his 'perception and memory could be adequately evaluated.' The purpose is simply to determine whether a witness of tender years is competent to testify. If the judge, in his discretion, feels that the witness possesses the requisite intelligence, respect for truth, and understanding

of the oath, then the object of such a preliminary hearing is fulfilled. Once placed on the stand, this witness may be cross-examined, like any other competent witness to determine the weight and credibility of his testimony. It is here, in open court that the defendant has the right to confront the witness and probe into his capacity for memory and perception." *Id.*

A fifth state court rejected similar claims under the due process clause. *People* v. *Garland,* 393 N.W. 2d 896 (Mich. App. 1986). Garland was excluded from the competency hearing of his seven-year-old daughter. The court held his absence from the hearing, which was strictly limited to the issue of competency, did not adversely affect his substantial rights.

Each of these cases is consistent with this Court's interpretation of the right to be present guaranteed by the Confrontation and Due Process Clauses. A competency hearing is not a stage of trial where evidence or witnesses are being presented to the trier of fact. The purpose of the hearing is purely a preliminary decision by the trial judge on whether a young, typically frightened child is competent to testify. There is no constitutional right to cross-examine a child witness, or any other witness, before they offer testimony in court. If the child is deemed competent, he or she is subject to full cross-examination and confrontation in open court like all other witnesses. Each of the victims in the present case was confronted and cross-examined before the jury. Numerous competency questions which shed light on the credibility of

the witnesses were repeated in open court. The trial court placed no restrictions on cross-examination. Respondent's right to confrontation was satisfied. The Supreme Court of Kentucky erred when it fashioned from the Confrontation Clause an additional right to presence for presence's sake at a preliminary competency hearing. The right to confront should not have been transformed into a right to intimidate.

C. Stincer's Absence From The Competency Hearing Did Not Violate Due Process.

While the Supreme Court of Kentucky did not decide the unargued question of whether respondent was denied due process by his absence, it is apparent from the record that due process was satisfied. He has never even alleged and cannot show that he could have done anything had he attended the hearing. See *United States* v. *Gagnon,* 470 U. S. at 527. In fact, he received more than he was entitled to through counsel's unrestricted examination of the children. The added presence of respondent at the hearing is a classic example of presence that is "useless" and "the benefit but a shadow." *Snyder* v. *Massachusetts,* 291 U. S. at 106.

The Supreme Court of Kentucky was no doubt a victim of Justice Cardozo's "tyranny of labels." *Snyder,* 291 U. S. at 114. They were incorrectly persuaded that "trial" included preliminary proceedings where counsel's role is largely mechanical and "evidence" included any collateral words from a potential witness. Nor was the competency hearing a "critical stage" for purposes of due process because there is no

reasonably substantial relationship to the opportunity to defend.

D. A Balancing Of Interests Weighs In Favor Of Kentucky And Furthers The Mission Of Confrontation.

Should this Court decide that the Confrontation Clause extends to preliminary competency hearings, it must then consider the balance between the interests of the defendant in being present at the hearing and the interests of the state in the prosecution of child sexual abuse.

The average criminal trial never raises the issue of witness competency. In child sexual abuse cases, however, competency is routinely raised. Significant conflicts among the interests of the state, the defendant, and the victim come into sharpest focus in child sexual abuse cases, where the competency of the witness, usually the victim, is in question. The only eyewitness to the crime is often a child of tender years who has been betrayed by a powerful, trusted adult. Asking such a witness to understand, not to be afraid, and to respond in a court of law as a mature adult is asking too much in most cases. For this reason, many charges will never be prosecuted.[8]

The National Center on Child Abuse and Neglect reported in 1981 that the average age of a victim of child sexual abuse was between 11 and 14, but more recent data from one program showed that one-third

[8]See, for example, *State* v. *Sheppard*, 484 A. 2d 1330, 1333 (N.J. Super. 1984).

of the victims were under age six.[9] In Kentucky, for the period 1978-1984, sexual abuse was found to be highest for victims during the early teen years but was not much lower during earlier childhood. "A three-year-old child is only a third less likely to be a victim of sexual abuse than is a 13-year-old child."[10] In the majority of states these young children will be subjected to a separate hearing or voir dire examination to determine their competency as a witness.[11]

Stincer argues he is entitled to be present at such a hearing, but has never persuasively demonstrated a legitimate interest in attending the competency proceeding. The sole question to be decided by the trial judge is whether the proposed witness has the mental capacity to testify as a competent witness. The defendant's presence will not improve the child's ability to recall and relate basic facts about her life or the distinction between the truth and a lie. Nor will it assist the judge in assessing the child's responses. On the contrary, evidence, as well as common sense, strongly suggests that the defendant's presence will be, if any-

[9]Bulkley, Evidentiary And Procedural Trends In State Legislation And Other Emerging Legal Issues In Child Sexual Abuse Cases, 89 DICKINSON L. R. 645, 647 (1985); Ordway, Parent-Child Incest: Proof At Trial Without In Court Testimony By The Victim, 15 UNIV. OF MICH. J. LAW REFORM, 131, 133, note 8 (1981) [the victim is generally younger than twelve].

[10]*Child Abuse And Neglect In Kentucky: 1978-1984*, Kentucky Criminal Justice Statistical Analysis Center, University of Louisville, December 1985.

[11]Eastman, *supra* n. 6, at 43-46.

thing, counterproductive.[12] Additionally, there is no reasonably substantial relationship between the child's responses to these limited questions and the defendant's opportunity to defend. Stincer has never alleged any way in which he could have assisted his counsel at the competency hearing, much less any substantial right irretrievably lost despite his full opportunity of confrontation and cross-examination at trial. His presence at the competency hearing could serve no purpose other than to intimidate the child. *Moll* v. *State,* 351 N. W. 2d at 644. Stincer's cloak of constitutional claims cannot hide the substance of his ploy.

The interests of Kentucky, on the other hand, are compelling.[13] The actual incidence of child sexual abuse is estimated to be substantially underreported, "largely because of the trauma of pretrial and trial procedures for the complaining witness."[14] Child sexual abuse is fundamentally different from the way most

[12]Ordway, *supra* n. 9, at 137-138 [a child's disabilities, in terms of communication skills, sense of time and memory, tend to intensify when the child is under stress]. The oppressiveness of this additional contact with the perpetrator for the child witness will be heightened by the fact that most competency hearings will occur "in chambers." In other words, one child of tender years in a small office with prosecutor, defense counsel, judge, reporter and the perpetrator.

[13]This Court agreed that the state's interest in "safeguarding the physical and psychological well-being of a minor—is a compelling one." *Globe Newspaper Company* v. *Superior Court,* 457 U. S. 596, 607 (1982).

[14]Parker, The Rights Of Child Witnesses: Is The Court A Protector Or Perpetrator? 17 N. Eng. L. Rev. 643, 644-645 (1982).

adults experience sexual assault.[15] The crime typically does not involve a sudden overpowering by a stranger. Instead, the children "are usually persuaded and tricked by known, and often trusted, adults into repeated sexual activity over extended periods of time."[16] Because of the inherent abuse of authority and trust, the child victim is often frightened at having to face the molester again.[17] The psychological damage is more severe if the child must testify against a person he knows than against a stranger.[18] This damage may be compounded where, as some studies show, between 40 and 65 percent of reported sexual abuse cases involve parents.[19] Fear of retaliation is especially likely if the offender is an acquaintance or relative.[20] In all sexual abuse cases, repeated court appearances compound the trauma of public testimony and may be damaging.[21]

During recent years, as child sexual abuse reporting has increased dramatically, resulting in an influx of child victims into the criminal justice system, the public has become increasingly sentitive to the special

[15]Berliner, The Child Witness: The Progress And Emerging Limitations, 40 U. of Miami L. Rev. 167 (1985).

[16]*Id.* at 168.

[17]Parker, *supra* n. 14, at 651.

[18]*Id.* at 646, 653.

[19]Ordway, *supra* n. 9, at 131, n. 5.

[20]Parker, *supra* n. 14, at 651.

[21]*Id.* at 652; Note, Defendants' Rights In Child Witness Competency Hearings: Establishing Constitutional Procedures For Sexual Abuse Cases, 69 Minn. L. Rev. 1377, 1390 (1985).

needs of this large class of victims/witnesses. A surge of legislative reforms is spreading rapidly across the United States.[22] The voice of the public is reflected in the words of one author: "A criminal justice system which does not accommodate a whole class of victims, especially those who are the most vulnerable, helpless, and deserving of protection, does not serve society well."[23] The state also has an interest in ensuring the accuracy of the evidence at trial. This is the mission of the Confrontation Clause. *Tennessee* v. *Street,* 471 U. S. 409, 415 (1985). Fear or emotional stress produces unreliable evidence from child victims.[24] In the words of one trial judge, who has seen it happen, "[t]hey become so further traumatized by the prospect of testifying in front of their abusers that they cannot speak about the central happenings or can do so only with great difficulty and doubtful accuracy." *State* v. *Sheppard,* 484 A. 2d 1330, 1335 (N. J. Super. 1984). Eliminating the unnecessary trauma of a preliminary confrontation with the accused, especially one where the victim and defendant are typically in the close proximity of "chambers," will enhance the accuracy of the child's testimony at trial. For this reason the position urged by Kentucky does not violate the Confrontation Clause, rather it advances its very mis-

[22]Berliner, *supra* n. 15, at 172; Eastman, *supra* n. 6.

[23]Berliner, *supra* n. 15, at 179.

[24]Ordway, *supra* n. 9, at 137; Goodman and Helgeson, Child Sexual Assault: Children's Memory And The Law, 40 U. OF MIAMI L. R. 181, 190 (1985).

sion. See *United States* v. *Inadi,* 475 U. S. ——, 106 S. Ct. 1121, 1127 (1986).

E. Jurisdiction.

Anticipating respondent's argument that the decision of the Kentucky Supreme Court in this case was based in its entirety on state constitutional law, petitioner will briefly answer this jurisdictional question. It is clear that since this Court's decision in *Michigan* v. *Long,* 463 U. S. 1032, 1040-41 (1983), presumptive jurisdiction exists "when it is not clear from the Opinion itself that the state court relied upon an adequate and independent state ground" and when the decision fairly appears to be interwoven with or rest primarily upon federal law. *Michigan* was necessitated by state court decisions which relied upon both federal and state constitutional provisions in the same breath; the classic example is the holding of the Michigan Supreme Court in that case that an automobile search "was proscribed by the Fourth Amendment to the United States Constitution and Art. 1, § 11 of the Michigan Constitution" (463 U. S. at 1037, note 3).

This approach is *identical* to that of the Kentucky Supreme Court in the case at bar. In reaching its decision, it first invoked the Sixth Amendment to the United States Constitution; only then was the Kentucky Constitution mentioned. *Stincer* v. *Commonwealth, supra* (J.A. 81-82). No distinction is made between the two provisions (*Id.*). The Kentucky court declined to adopt the interpretations of other states on

the federal constitutional issue but made no clear and express statement that this conclusion was based upon state law (*Id.*, at J.A. 83). Had the Kentucky Supreme Court desired to rest its decision solely upon state constitutional law, the court had only to indicate that the decision was based on bona fide separate, adequate, and independent grounds. *Michigan* v. *Long,* 463 U. S. at 1014. Where the state appellate court has failed to so indicate, the jurisdiction of the Court is clear. See *California* v. *Carney,* 471 U. S. 386, 389, note 1 (1985); *Caldwell* v. *Mississippi,* 472 U. S. 320 (1985); and *Delaware* v. *Van Arsdall,* 475 U. S. —, 106 S. Ct. 1431, 1435, note 3 (1986).

Respondent's denial that the Kentucky Supreme Court decided the case the way it did because it believed federal law required it to do so (Respondent's Brief in Opposition to Certiorari, at 4), is particularly weak in light of the Kentucky court's longstanding practice of interpreting confrontation issues based upon federal case law. In the case of *Scott* v. *Commonwealth,* 616 S. W. 2d 39, 42-43 (Ky. 1981), involving a defendant's refusal to attend trial, the court interpreted Kentucky Rule of Criminal Procedure [RCr] 8.28 (1) as a codification of the "common law right to be present at criminal proceedings, which has been recognized and preserved in the 6th Amendment to the United States Constitution and Section 11 of the Kentucky Constitution." In holding that Scott had waived his presence right the court relied upon the analysis in *Illinois* v. *Allen,* 397 U. S. 337 (1970).

In the case of *Commonwealth* v. *Willis,* 716 S. W. 2d 224, 227, 229 (Ky. 1986), the court expressly stated:

> "The requirement in the Kentucky Constitution to 'meet witnesses face to face' is basically the same as the Sixth Amendment to the federal constitution which provides a right of confrontation.
>
> * * *
>
> There is no authority to support the proposition that the right of confrontation guaranteed by the Kentucky Constitution should be construed more stringently than the same right in the United States Constitution."

Prior to *Illinois* v. *Allen, supra,* Kentucky cases consistently questioned whether preliminary examinations of proposed witnesses may properly be regarded as part of the trial, but the question was never reached due to the alternative ground of waiver of any constitutional right.[25] In the only decision previously to consider the constitutional source of the right to be present, the court expressly held that this right is a requirement of Section Eleven of the Kentucky Constitution and "a condition of due process of law assured by the Fourteenth Amendment to the Federal Constitution." *Powell* v. *Commonwealth,* 346 S. W. 2d 731, 734 (Ky. 1961).

In the same manner the Supreme Court of Kentucky has interpreted other provisions of the Kentucky Bill of Rights as being identical to, and no more strin-

[25] *Harris* v. *Commonwealth,* 285 S. W. 2d 489, 493 (Ky. 1956); *Hoskins* v. *Commonwealth,* 188 Ky. 80, 221 S. W. 230, 233 (1920).

gent than, the requirements of the United States Constitution. *Jordan* v. *Commonwealth,* 703 S. W. 2d 870, 872 (Ky. 1985) (Double Jeopardy Clause identical); *Estep* v. *Commonwealth,* 663 S. W. 2d 213 (Ky. 1983) (federal construction of Fourth Amendment adopted; contrary decisions overruled). The consistent reliance of the Supreme Court of Kentucky on the United States Constitution when interpreting its own Constitution and rules of procedure clearly demonstrate that its decision on the constitutional issue in the case at bar rests primarily on federal law and that there is no adequate and independent state court ground.

II.

Assuming a Violation of the Confrontation Clause of the Sixth Amendment in Excluding the Respondent From a Child Witness Competency Hearing, the Kentucky Supreme Court Erred by Its Failure to Consider Whether the Violation Was Harmless.

In determining that the Confrontation Clause was violated and reversing respondent's conviction, the Kentucky Supreme Court did not require respondent to demonstrate that his absence from the competency hearing actually and materially prejudiced his defense.[26] Even assuming that this Court agrees with the

[26]The Kentucky Supreme Court did state that the "determination of whether the child witnesses could testify was critical to the prosecution's case, as their testimony comprised the gravamen of the charges against appellant Stincer." *Stincer* v. *Commonwealth, supra* (J.A. 82) (majority opinion). This statement begs the question. By the same token a defendant would have virtually unlimited confrontation or due process rights to be present at a

(Footnote Continued on Next Page)

Kentucky Supreme Court that Sergio Stincer's confrontation rights were violated, summary reversal was not required. This Court has flatly stated that the right to be present is subject to harmless error analysis. *Rushen* v. *Spain,* 464 U. S. 114, 118, note 2 (1983) (per curiam). The Kentucky Supreme Court should have considered whether the error was harmless. There are three reasons why such an approach is appropriate, and why the assumed error should be held by this Court to be harmless under the facts of this case.

A. Stincer's Interest In Attending The Competency Hearing Was Minimal And Conflicted With Compelling State Interests.

Because a child witness competency proceeding is a limited, preliminary hearing on the very narrow issue of whether the child is competent to testify before the trier of fact, Stincer's interest in attending the hearing was minimal. Because the sole issue was the child's competency—a decision which is particularly the province of the trial judge—there was no necessity for Stincer to be present. What could Stincer have contributed to the accuracy or fairness of the hearing? How did his presence bear, "a relation, reasonably substantial," to his "opportunity to defend?" *Snyder* v. *Massachusetts,* 291 U. S. 97, 106-07 (1934). Any violation of Stincer's confrontation rights by restrict-

(Footnote Continued From Preceding Page)

lab test where the forensic evidence being examined constituted the "gravamen" of the charges against him. There are many phases of any criminal prosecution at which the defendant has no right of presence but at which decisions "critical to the prosecution's case" will be made.

ing his presence at the preliminary hearing was extremely limited and devoid of prejudice. Moreover, as has already been demonstrated, Stincer's minimal interest in the competency hearing is substantially outweighed by the interest of the state in protecting its child witnesses from the increased trauma of repeated court appearances. See pp. 24-28, *infra;* Amici Curiae Brief of the State of Arkansas, et al., pp. 9-10, 22-27. Only last term this Court reaffirmed that the "harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall,* 475 U. S. ——, 106 S. Ct. 1431, 1436 (1986). Nothing that respondent has presented, either to the Kentucky Supreme Court or to this Court, undermines the fairness and accuracy of the factual determination of guilt or innocence in the case at bar. Harmless error analysis by the Kentucky Supreme Court was mandated.

B. There Was No Restriction On Cross-Examination.

Second, the court's restriction upon the personal presence of Stincer at the competency hearing should be subject to harmless error analysis because Stincer was not restricted in his cross-examination of the child witnesses before the trier of fact. His opportunity for cross-examination was unlimited, as demonstrated by the fact that all three children were asked competency questions during both direct and cross-examination. All three child witnesses answered numerous competency questions which reflected upon their "capacity

and intelligence" and their "appreciation of the difference between truth and falsehood as well as . . . [their] duty to tell the former." *Wheeler* v. *United States,* 159 U. S. 523, 524 (1895).

Although each of the three child witnesses in this case was cross-examined by defense counsel, this fact is not necessary to a finding of harmless error. What is of constitutional significance is that Stincer had a full and complete *opportunity* to cross-examine these witnesses. No restriction of any kind was placed upon him. This satisfies the dictates of the Confrontation Clause because the essential purpose of confrontation is to secure for the defendant the opportunity of cross-examination. *Delaware* v. *Van Arsdall,* 475 U. S. ——, 106 S. Ct. 1431, 1435 (1986); *Davis* v. *Alaska,* 415 U. S. 308, 315-16 (1974) [quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3rd ed. 1940)]. As only recently stated by this Court in *Delaware* v. *Fensterer,* 474 U. S. ——, 106 S. Ct. 292, 295 (1985) (per curiam), "[g]enerally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" (emphasis by the Court). Respondent had his *opportunity* to fully confront the child witnesses before the trier of fact, where it really counted and where his guilt or innocence would be decided. Any error in excluding respondent from the child witness competency hearing should be held to be harmless.

C. This Court Has Repeatedly Rejected Reversal Without Regard to Prejudice.

In *Chapman* v. *California,* 386 U. S. 18 (1967), the Court firmly rejected the argument that all federal constitutional errors, regardless of significance to the specific case, must be considered inherently harmful. The Court reasoned that in the context of a particular case the perceived error may have had very little influence (if any) on the jury's verdict at trial, and that where a reviewing court may confidently say that no such effect occurred, the reversal of the conviction provides an unjustified windfall for the defendant. *Id.* at 21-24; *United States* v. *Hasting,* 461 U. S. 499, 508-509 (1983). Since Chapman, the Court has repeatedly reaffirmed the principle that an otherwise valid conviction will not be set aside if the constitutional error that occurred before or during trial was harmless.[27]

The harmless error doctrine furthers numerous fundamental interests relevant to the administration of criminal justice. First, it gives effect to the principle that the essential purpose of a criminal trial is to decide

[27]In the recent past the Court has applied the harmless error doctrine in a Sixth Amendment Confrontation Clause context in *Delaware* v. *Van Arsdall,* 475 U. S. ___, 106 S. Ct. 1431 (1986) (limitation on cross-examination regarding bias); *U. S.* v. *Bagley,* 473 U. S. ___, 87 L. Ed. 2d 481 (1985) (*Brady* error); *Rushen* v. *Spain,* 464 U. S. 114 (1983) (right to be present at trial); *Brown* v. *United States,* 411 U. S. 223, 231-232 (1973) (admission of out-of-court statement in violation of Sixth Amendment Confrontation Clause); *Schneble* v. *California,* 405 U. S. 427 (1972) (*Bruton* error); *Harrington* v. *California,* 395 U. S. 250 (1969) (*Bruton* error).

the factual question of the defendant's guilt or innocence. *United States* v. *Nobles,* 422 U. S. 225, 230 (1975). In addition, it promotes public respect for the criminal process by focusing on the underlying fairness of the trial, rather than on immaterial technicalities. See *Hasting,* 461 U. S. at 509; *Kotteakos* v. *United States,* 328 U. S. 750, 759-760 (1946). The doctrine also contributes to the finality that is essential if punishment is to serve its intended purpose. Finally, it conserves scarce trial resources by eliminating burdensome retrials where correction of the error is not likely to improve the reliability of the verdict. In essence, by eliminating needless retrials where it can be confidently said that no materially prejudicial error occurred at trial, the harmless error doctrine allows an appellate court "to keep the balance true." *Snyder* v. *Massachusetts,* 291 U. S. at 122 (1934).

Finally, only in a limited number of circumstances has the Court held that a finding of constitutional error is so devastating that reversal is warranted in every case. Expanding this class of cases to include the exclusion of a defendant from a child witness competency hearing is not warranted by either the facts of this case, the appropriate construction of constitutional provisions involved, or the interests of the competing parties. As has been demonstrated, the purpose of confrontation has been fully served in this case. Where the constitutional error is extremely narrow, where the interests of the defendant are minimal, and where the defendant's rights to confrontation were fully protected at trial by unrestricted cross-examination, this Court may decide

the issue on the record. Petitioner submits that because the error, if it occurred, was so patently harmless in this case, it is appropriate for the Court to decide the issue. The Court plainly has the authority to do so. *United States* v. *Hasting,* 461 U. S. at 510. Only last term the Court analyzed and decided the harmless error issue in *United States* v. *Lane,* 474 U. S. ——, 106 S. Ct. 725, 732 (1986), where it was clear that the error failed to have a substantial impact on the verdict. For example, in *United States* v. *Bagley,* 473 U. S. ——, 87 L. Ed. 2d 481, 491 (1985), which, like this case, did not involve any direct restriction of cross-examination at trial, the Court held that reversal was warranted only if the error undermined confidence in the outcome of the trial. Here there is no reasonable likelihood of such an occurrence.

The Court has repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the constitutional error that occurred was harmless. Indeed, in *Hasting* the Court made clear that "it is the *duty* of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless." 461 U. S. at 509 (emphasis added); see also, 28 U.S.C. §2111; Fed. R. Crim. P. 52(a). The Kentucky Supreme Court erred in not applying harmless error analysis to this case.

CONCLUSION

The right of presence under the Confrontation Clause does not extend to a preliminary competency hearing which is unrelated to the determination of guilt or innocence by the trier of fact. Neither may such a right be found in Fifth and Fourteenth Amendment due process guarantees. Finally, even if this Court should conclude that respondent's confrontation rights were violated by his exclusion, the Kentucky Supreme Court erred by its failure to consider whether the error was harmless. Because the harmlessness of any error is clear on the record, this Court should hold that any constitutional violation was harmless. For these reasons the judgment of the Kentucky Supreme Court should be reversed.

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RESPONDENT'S

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No. 86-572

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

SERGIO STINCER,
Respondent.

On Writ Of Certiorari
To The Supreme Court Of Kentucky

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I. Did respondent's exclusion from the competency hearing violate his rights of confrontation and effective assistance of counsel under the Sixth Amendment and due process of law under the Fourteenth Amendment?

II. Did the Kentucky Supreme Court err in failing to apply a harmless error analysis in this case? Even if such an analysis is applied, could the error in this case have been harmless beyond a reasonable doubt?

III. Did this Court improvidently grant certiorari in view of the fact that the decision of the Kentucky Supreme Court rests on adequate independent state grounds?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1-6
SUMMARY OF ARGUMENT	6-9
ARGUMENTS	
I. THE OPINION OF THE KENTUCKY SUPREME COURT SHOULD BE AFFIRMED SINCE THE EXCLUSION OF RESPONDENT BY THE TRIAL COURT FROM THE COMPETENCY HEARING VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION	9-39
II. THE KENTUCKY SUPREME COURT DID NOT ERR IN FAILING TO APPLY THE HARMLESS ERROR TEST IN THIS CASE	39-46
III. THE OPINION OF THE KENTUCKY SUPREME COURT RESTS ON ADEQUATE INDEPENDENT STATE GROUNDS	46-50
CONCLUSION	50

TABLE OF AUTHORITIES

	Page
Alford v. *United States*, 282 U.S. 687 (1931)	7, 12
Barber v. *Page*, 390 U.S. 719 (1968)	12, 13
Berger v. *California*, 393 U.S. 314 (1969)	12
Bruton v. *United States*, 391 U.S. 123 (1968)	12
Capps v. *Commonwealth*, 560 S.W.2d 559 (Ky. 1977)	10, 14
Chambers v. *Mississippi*, 410 U.S. 284 (1973)	12, 13
Chapman v. *California*, 386 U.S. 18 (1967)	44
Coffin v. *United States*, 156 U.S. 432 (1895)	38
Coleman v. *Alabama*, 399 U.S. 1 (1970)	20, 29, 42
Commonwealth v. *Doucette*, 496 N.E.2d 837 (Mass.App. Ct. 1986)	22
Commonwealth v. *Willis*, 716 S.W.2d 224 (Ky. 1986)	48, 50
Dandrige v. *Williams*, 397 U.S. 471 (1970)	28
Davis v. *Alaska*, 415 U.S. 308 (1974)	13, 19
Delaware v. *Fensterer*, 474 U.S. ___, 106 S.Ct. 292 (1985)	11, 45
Delaware v. *Van Arsdall*, 475 U.S. ___, 106 S.Ct. 1431 (1986)	40, 41, 46
District of Columbia v. *Armes*, 107 U.S. 519 (1883)	27
Douglas v. *Alabama*, 380 U.S. 415 (1965)	13
Dowdell v. *United States*, 221 U.S. 325 (1911)	11
Dutton v. *Evans*, 400 U.S. 74 (1970)	13
Evans v. *Hettich*, 20 U.S. 453 (1822)	27
Evitts v. *Lucey*, 469 U.S. 387 (1985)	23
Faretta v. *California*, 422 U.S. 806 (1975)	19, 23, 25, 28
Flatt v. *Commonwealth*, 468 S.W.2d 793 (Ky. 1971)	50
Fleming v. *Commonwealth*, 280 S.W.2d 148 (Ky. 1955)	50
Geders v. *United States*,425 U.S. 80 (1976)	30
Gerstein v. *Pugh*, 420 U.S. 103 (1975)	20, 21, 29, 32
Gideon v. *Wainwright*, 372 U.S. 335 (1963)	29
Glasser v. *United States*, 315 U.S. 60 (1942)	29, 43
Globe Newspaper Co. v. *Superior Court*, 457 U.S. 596 (1982)	37
Harrington v. *California*, 395 U.S. 250 (1969)	41

Table of Authorities Continued

	Page
Harris v. *Commonwealth*, 315 S.W.2d 630 (Ky. 1958)	50
Heckler v. *Campbell*, 461 U.S. 458 (1983)	28
Hill v. *Commonwealth*, 474 S.W.2d 95 (Ky. 1971)	50
Hochheiser v. *Superior Court*, 161 Cal.App.3rd 777, 208 Cal.Rptr. 273 (Cal.App. 2 Dist. 1984)	37
Holloway v. *Arkansas*, 435 U.S. 475 (1978)	43
Hopt v. *Utah*, 110 U.S. 574 (1884)	25
Illinois v. *Allen*, 397 U.S. 337 (1970)	12, 13, 26, 49
In re Little, 404 U.S. 553 (1972)	23
Johnson v. *Zerbst*, 304 U.S. 458 (1938)	29
LaChappelle v. *Moran*, 699 F.2d 560 (1st Cir. 1983)	15
Lee v. *Illinois*, ___ U.S. ___, 106 S.Ct. 2056 (1986)	12
Lewis v. *United States*, 146 U.S. 370 (1892)	11
Mattox v. *United States*, 156 U.S. 237 (1895)	11, 12, 27
McCray v. *Illinois*, 386 U.S. 300 (1967)	20
McGoldrick v. *Compagnie Generale*, 309 U.S. 430 (1940)	28
McKaskle v. *Wiggins*, 465 U.S. 168 (1984)	23
McMann v. *Richardson*, 397 U.S. 759 (1970)	29
Mempa v. *Rhay*, 389 U.S. 128 (1967)	29
Michigan v. *Long*, 463 U.S. 1032 (1983)	9, 47, 48, 50
Moll v. *State*, 351 N.W.2d 639 (Minn.App. 1984)	21
Moore v. *Commonwealth*, 384 S.W.2d 498 (Ky. 1964)	10, 14, 15
Nelson v. *O'Neill*, 402 U.S. 622 (1971)	21
Nevells v. *Pratt*, 596 F.2d 344 (8th Cir. 1979)	43
Ohio v. *Roberts*, 448 U.S. 56 (1980)	12
People v. *Breitweiser*, 349 N.E.2d 454 (Ill.App. 1976)	21
Pointer v. *State of Texas*, 380 U.S. 400 (1965)	10, 12
Powell v. *Commonwealth*, 346 S.W.2d 731 (Ky. 1961)	48
Rogers v. *United States*, 422 U.S. 35 (1975)	25
Rushen v. *Spain*, 464 U.S. 114 (1983)	8, 41, 42, 43
Schwab v. *Berggren*, 143 U.S. 442 (1892)	25
Scott v. *Commonwealth*, 616 S.W.2d 39 (Ky. 1981)	49

Table of Authorities Continued

	Page
Shields v. *United States*, 273 U.S. 583 (1927)	25
Simmons v. *United States*, 390 U.S. 377 (1968)	24
Smith v. *United States*, 414 A.2d 1189 (D.C. App. 1980)	18, 22
Snyder v. *Massachusetts*, 291 U.S. 97 (1934)	7, 25, 28, 41, 42
State v. *Cermak*, 350 N.W.2d 328 (Minn. 1984)	22
State v. *Taylor*, 704 P.2d 443 (N.M.App. 1985)	21
State v. *Warford*, 389 N.W.2d 575 (Neb. 1986)	22
Stincer v. *Commonwealth*, 712 S.W.2d 939 (Ky. 1986)	*passim*
Strickland v. *Washington*, 466 U.S. 668 (1984)	30, 31, 32
Taylor v. *Kentucky*, 436 U.S. 478 (1978)	38
Taylor v. *United States*, 414 U.S. 17 (1973)	26
Tennessee v. *Street*, 471 U.S. 409 (1985)	7, 14
United States v. *American Railway Express Co.*, 265 U.S. 425 (1924)	28
United States v. *Ashe*, 413 U.S. 300 (1973)	8, 31
United States v. *Benfield*, 593 F.2d 815 (1979)	16, 19
United States v. *Cronic*, 466 U.S. 648 (1984)	31
United States v. *Gagnon*, 470 U.S. 522 (1985)	26
United States v. *Kupau*, 781 F.2d 740 (9th Cir. 1986)	43
United States v. *Wade*, 388 U.S. 218 (1967)	20, 29
United States v. *Walsh*, 700 F.2d 846 (2d Cir. 1983)	43

CONSTITUTION:

Fourteenth Amendment, U.S. Constitution	*passim*
Section Eleven, Kentucky Constitution	*passim*
Sixth Amendment, U.S. Constitution	*passim*

STATUTES AND RULES:

KRS 421.200	14
KRS 421.350	17

Table of Authorities Continued

Page

Federal Rules of Evidence, Rule 104, 28 U.S.C.A., Notes of Advisory Committee on Proposed Rules, Note to Subdivision (a) 15

Kentucky Supreme Court Rule 1.020(1)(a)..... 48, 49

MISCELLANEOUS:

5 J. Wigmore, Evidence, § 1395 (3d ed. 1940)..... 19

Amicus Curiae Brief, American Psychological Association..... 33, 34

Berliner, The Child Witness: The Progress And Emerging Limitations, 40 U. OF MIAMI L. REV. 167 (1985). 36

Bulkley, Evidentiary And Procedural Trends In State Legislation And Other Emerging Legal Issues In Child Sexual Abuse Cases, 89 DICKINSON L. REV. 645 (1985)..... 36

Bulkley, Introduction: Background And Overview Of Child Sexual Abuse, Law Reforms in the Mid-1980's, 40 U. OF MIAMI L. REV. 5..... 36

E. Benedek and D. Schetky, *Allegations of Sexual Abuse in Child Custody Cases*, Annual Meeting of the American Academy of Psychiatry and the Law, Nassau, Bahamas (Oct. 26, 1984) 36

Dorschner, *A Question of Innocence*, Miami Herald, July 28, 1985 (Tropic Magazine)..... 37

Editorial, *6th Amendment Outweighs Desire To Protect Children*, Lexington Herald-Leader, Vol. 5, No. 22, January 24, 1987..... 39

Melton, *Children's Testimony in Cases of Alleged Sexual Abuse*, to be published in ADVANCES IN DEVELOPMENTAL AND BEHAVIORAL PEDIATRICS (Wolraich and Routh, eds, 1987) 33

Melton, *Sexually Abused Children and the Legal System: Some Policy Recommendations*, 13 AM.J. FAMILY THERAPY 61 (1985)..... 34

Melton and Thompson, *Getting Out of a Rut: Detours to Less Traveled Paths in Child Witness Research, to be published in* CHILDREN'S EYEWITNESS MEMORY (Ceci, Toglia, and Ross eds. *in press*)..... 33

Table of Authorities Continued

Page

Morey, The Competency Requirement For The Child Victim of Sexual Abuse: Must We Abandon It? 40 U. OF MIAMI L. REV. 245 (1985)..... 36-37

Protecting Child Victim/Witnesses, Sample Laws and Materials, National Legal Resource Center For Child Advocacy And Protection; ABA Young Lawyers Division (February, 1986)..... 35

STATEMENT OF THE CASE

The Statement of the Case which is contained in the Brief for Petitioner does not paint a true picture of what occurred at this trial. The evidence against respondent was much less convincing and one-sided than the version submitted by petitioner in its brief. The competency and credibility of the chief prosecuting witnesses was open to grave doubt. Repondent will attempt to correct some of the inaccuracies and omissions contained in the Commonwealth's accounting of this case. In the interest of brevity, respondent is not attempting to totally recreate the trial or present a full Statement of the Case.

The charge against the five (5) year old boy, B.H., Jr., was dismissed prior to trial. The Commonwealth fails to point out that the boy told authorities respondent "did not put his d-i-c-k in his mouth" (Transcript of Evidence, hereinafter TE 14; Joint Appendix, hereinafter J.A. 1).

After the dismissal of the charges against the young boy, respondent remained charged with the first degree sodomy of eight (8) year old female T.M.G. and seven (7) year old female P.N.G. Respondent was excluded from the competency hearing of these two young girls over his objection (J.A. 2). The children had not testified in any manner prior to respondent being excluded. There was no showing or any argument presented that respondent's presence would inhibit the children in any way, scare them in any way or prevent them from testifying. There was no such argument made and there was no finding made by the court to this effect. The court simply announced, prior to the beginning of the competency proceedings, that "I think we need to get Mr. Stincer back in the courtroom while we're interviewing these children in chambers" (J.A. 2).

The competency hearing reveals a very close question as to whether either of the witnesses was competent to testify. T.M.G. was totally unable, in spite of being asked repeatedly, to explain or describe the difference between telling the truth and telling a lie. She stated that she would "[g]et in trouble" if she told a story (J.A. 5). But she was never able to indicate that she actually knew what these concepts meant. When asked

what it meant to tell a lie (J.A. 4-5), her response was "[d]on't tell stories" (J.A. 5).

P.N.G. was also unable to explain the difference between telling the truth and telling a lie. When asked by the judge whether she knew the difference, she nodded her head negatively (J.A. 7-8). At that point, the judge said, "I don't know about this one" (J.A. 8). When asked by defense counsel whether she knew why she shouldn't tell a lie, she shook her head negatively (J.A. 9). The only indication she ever gave that she knew the difference between telling the truth and a lie was a correct response she gave the judge when he posed a hypothetical situation to her (J.A. 9). She also stated that the prosecutor had told her what to say (J.A. 10), but the judge attempted to clarify this remark by asking her whether the prosecutor had actually only attempted to ask her *how* to testify and not what to testify.[1] In spite of the problems the children had had at the competency hearing, defense counsel made no objection to the rulings of the court that T.M.G. and P.N.G. were competent to testify.

The testimony given by the young witnesses in front of the jury revealed even more serious and obvious problems as to their competency. T.M.G. testified on direct examination that respondent "put some pudding in [her] mouth . . . [a]nd then . . . his d-i-c-k" (J.A. 14). She testified that she told her mother of the incident when she arrived home (J.A. 15). But on cross-examination, the problems with the competency of this witness really began to show. She changed her testimony over and over again in regard to whom she told of this incident and when she told them (J.A. 17-26).[2] Defense counsel asked T.M.G. where

[1] P.N.G. never said that the prosecutor was only attempting to tell her how to testify instead of what to testify. These were the judge's words and the child only nodded affirmatively when the question was asked. It certainly appears that the judge was leading this seven (7) year old child at this time (J.A. 10).

[2] The Commonwealth discounts the importance of these inconsistencies and dismisses them as a "peripheral issue" (Brief for Petitioner, 6). In actuality, however, this was very important. It was later

she had learned of the word "d-i-c-k" (J.A. 32). She responded that she had learned of it in a book at school and that it was "a boy's name" (J.A. 32). Defense counsel asked her to explain the difference in the way she had used the word previously and in the way she was then defining it (J.A. 33). But she had no idea what that word meant when used in the former context (J.A. 33-34). Defense counsel attempted to probe this *very* critical point, but T.M.G. became upset and began to cry (J.A. 34). The Court then took a break, but, upon returning, T.M.G. was unable to answer questions and the cross-examination had to be terminated. Defense counsel advised the court that he had further questions, but "if she's not going to respond I don't want to make it hard on her" (J.A. 40).

P.N.G. initially testified on direct examination that respondent only "put a red sock around my eyes. That's all I know and I don't know a bit more" (J.A. 43). The prosecutor asked her if she remembered anything else and she responded that she did not. But after being prodded by the prosecutor, she finally said that respondent "put some pudding on his d-i-c-k and put it in my mouth. That's all I know" (J.A. 44). She said that she called a "dick" a "dingdong" (J.A. 44-45).

When defense counsel began asking P.N.G. questions about the alleged sexual activity on cross-examination, she stated that she could not talk about what happened (J.A. 50). She responded several times that she was unable to answer any questions about it. Finally, she did say that "Sergio put some pudding on his d-i-c-k" (J.A. 50). But after being asked whether she saw him do that, she admitted that she did not see it but

conclusively established that T.M.G. was lying when she said that she told her mother of the incident when her mother returned home that day. Marie Griffin later testified that she did not learn of the incident until the social workers came to her house (TE 137). A most critical factor in this case was the identities of those individuals who talked to the children after the alleged incident. Bonita Griffin, Marie Griffin's sister-in-law, was jealous of respondent's other girlfriends and may have had a motive to hurt him. Bonita visited with the children before Marie Griffin was ever informed of the allegations.

was told by nine (9) year old S.T. that it had occurred (J.A. 51).[3] She then backtracked, stating that respondent gave her a pickle to eat, that it tasted good and that that was all that happened (J.A. 51-52). She admitted that she had told one of her friends a different story, but when asked by defense counsel whether she had lied on any occasion, she apparently became upset and refused to answer any more questions. The remainder of the questions posed by defense counsel went unanswered. She was then excused.

The prosecutor then announced that he had another young witness to be interviewed by the court. The witness was a five (5) year old boy, E.T. The courtroom was cleared and the child was examined by the court for the purpose of determining his competency. It is very apparent from the record that respondent was not present at the hearing.[4] The competency of this young child was *highly* suspect. At both the competency hearing and during trial, he *consistently* answered in whatever manner the examiner led him. He promised to tell the judge the truth, but when asked immediately thereafter if he would tell a lie, he responded by nodding affirmatively (TE 89). He admitted that he had been told, by his mother, what to testify in court (TE 91). The Court then proceeded to question him,

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[3] S.T. was the nine (9) year old daughter of Mary Tandy who later testified at trial. In spite of the fact that she was older than the other children, and in spite of the fact that she allegedly saw these things, she was never called to testify by the prosecution. The Commonwealth states that this child had been threatened by respondent (Brief for Petitioner, 5), but that was only an allegation provided through hearsay. The child never testified.

[4] The Commonwealth states in its brief that "respondent either was present or made no request to be present—the record is silent . . ." (Brief for Petitioner, 3, n.2). It is very obvious that respondent was not in the courtroom at the time of this competency hearing. It occurred midway during the trial and after he had been excluded, over his objection, from attending the competency hearing for the two girls, both of whom were older than he. While it is true that no objection was made on the record, such an objection would clearly have been futile in light of the court's earlier ruling.

during the competency hearing, about the charges against respondent. E.T. stated that he saw respondent "put his dick in everybody's mouth" (TE 91), including his own (TE 92). He stated that his sister, nine (9) year old S.T., was not present at the time (TE 93).[5] But then he said that S.T. *was* there and that respondent had put his "dick" in her mouth as well (TE 94). During cross-examination at the competency hearing, S.T. admitted that his mother had told him what to say and that he would get into trouble if he did not say what she had told him. (TE 98). He admitted that what he was telling the court were his mother's words, not his own (TE 107).[6]

This child provided very damaging testimony in front of the jury. Although he first stated that he could not remember what happened (TE 112), the prosecutor led him into saying that "Sergio put his dick in everybody's mouth" (TE 112). He testified that respondent put his penis in his mouth as well and that he saw him put it in P.N.G.'s mouth (TE 113).

The cross-examination of E.T. was a total exercise in futility. The child was obviously incompetent. He began by untruthfully testifying that T.M.G. and P.N.G. were his sisters (TE 115). He then admitted that they were not actually his sisters, but that his mother had told him to say that (TE 116). It was obvious that the child was providing whatever answer he thought the examiner wanted to hear. He testified that his mother had told him what to say, but that she had told him not

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[5] P.N.G. had previously testified that S.T. was present and even came in the room while these acts were occurring (J.A. 51).

[6] Defense counsel told the court that "it's clear he just responds to whatever way you lead him" (J.A. 101). He stated that respondent had put the sock over his eyes "yesterday" (TE 105). He then told the court that the truth was different from what his mother had told him to say and that he could not remember what was the actual truth (TE 106-107). In spite of the fact that the judge stated that "I think we have got some problems," the five (5) year old boy was declared competent to testify. Respondent argued, unsuccessfully, in the Kentucky Supreme Court that the trial court abused its discretion by declaring E.T. competent.

to say that she had told him what to say (TE 118). He testified on cross-examination that respondent "put his dick in my mouth," but then he testified *that his mother was in the room when that occurred* (TE 126). At that point, defense counsel again asked that the witness be declared incompetent to testify (TE 126). The motion was overruled (TE 127).

P.N.G. was recalled to the stand by the prosecutor. Again, she testified that she could not answer any more questions about what had happened (J.A. 58-59).

Beverly Smith, the social worker assigned to the case, testified that her office received an anonymous call in regard to this case on October 27, 1983 (TE 146). (The incident allegedly occurred on October 14, 1983). Beverly interviewed five (5) children about the alleged incident and she admitted that she received varying stories (TE 153).

Respondent was only witness for the defense. He testified that he recalled his previous birthday, the day that this alleged incident occurred. He admitted that he took care of the children that day, but he adamantly denied committing any sexual acts upon them (J.A. 61-62). He stated that Bonita Griffin had been his girlfriend. She had wanted to marry him, but he refused (J.A. 77). Marie Griffin and Bonita did not get along with each other and Bonita became angry with respondent on the day of his birthday because he took the kids to Bonita's house so that he could go to Ft. Campbell with Marie (J.A. 63-64). Respondent denied blindfolding any of the children. He admitted giving them chocolate pudding, but he strenuously denied having committed any sexual acts upon them. Respondent felt that Bonita planted the entire idea in the minds of the children because she did not like Marie, was jealous of respondent's other girlfriends and wanted to marry respondent. (J.A. 75-77).

Respondent was found guilty by the jury of first degree sodomy and was sentenced to twenty (20) years in prison. Final judgment was imposed on March 16, 1984 (J.A. v-vi).

SUMMARY OF ARGUMENT

The opinion of the Kentucky Supreme Court is based upon Section 11 of the Kentucky Constitution. This case rests on

adequate independent state grounds. But, even if only federal constitutional principles are applied, it is clear that respondent's rights were violated by the action of the trial court excluding him from the competency hearing.

Respondent's Sixth Amendment right to confront his accusers was violated by his exclusion from the competency hearing. That hearing was a trial proceeding and the judge was acting as trier of fact. The hearing was an inseparable and indispensable part of the trial process under Kentucky law. It was also a critical phase of the trial since a finding of no competency would likely have resulted in a legally insufficient case against the accused. By prohibiting respondent from being present at the hearing, and from confronting his principle accusers at the hearing, the reliability of the trial court's determination of competency was severely undermined. The "accuracy of the truth determining process" was thus adversely affected. *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985). The exclusion of respondent from the hearing resulted in an inadequate opportunity to cross-examine the witnesses at the hearing. The right of cross-examination, "one of the safeguards essential to a fair trial" [*Alford* v. *United States*, 282 U.S. 687, 692 (1931)], was effectively nullified. The opportunity for effective cross-examination later in front of the jury was grossly inadequate since the witnesses became upset and emotional, and the cross-examination had to be terminated. It was fundamentally unfair to exclude respondent from the competency hearing since he was present later when the cross-examination of the witnesses was attempted in front of the jury. This procedure resulted in the trial court being given a grossly inaccurate portrayal of the competency of these witnesses.

Respondent's due process rights were violated since he was excluded from a proceeding where his presence bore "a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge[s]." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105-106 (1934). The defendant in this situation has much to contribute to his own defense. The defendant is often in a position to know whether the witnesses are telling the truth at the competency hearing. The defendant may also be

aware of specific incidents which may have a bearing on the issue of competency.

Respondent's Sixth Amendment right to effective assistance of counsel was also violated in this case. Because he was absent from the hearing, the ability of his attorney to effectively represent him at the hearing was critically impaired. Counsel had to forego any assistance or input which could have been given by respondent at the hearing. The exclusion of respondent "interfere[d] . . . with the ability of counsel to make independent decisions" at the hearing. *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984). Counsel could not have been "acting as [respondent's] assistant" in this situation. *United States* v. *Ashe*, 413 U.S. 300,312 (1973).

In this case, a balancing of interests weighs heavily in favor of the defendant's right to be present at the hearing. The Commonwealth's position—that the state's ability to prosecute child sex abuse cases is being impaired by the presence of the accused at such hearings—is not supportable. The established opinion within the scientific and psychological communities as to whether children are necessarily inhibited or reluctant to testify in these types of cases is mixed. There is no compelling state interest present mandating that an accused be excluded from the competency hearing. In any event, even if some state interest can be demonstrated, the interest of the defendant to confront his accusers must predominate. These types of charges are often easy to level but difficult to defend. They often arise in child custody battles where children are being manipulated by adults. Because of the nature of these types of cases and because of the damage that can be wrought an innocent person by even a simple accusation, the courts need to be particularly mindful of the rights of the accused. The right of confrontation in a case of this nature is the most vital and important right accorded the accused.

The court should not employ a harmless error test in this case. The violation in this case represents a "core Confrontation Clause" violation which ought not to be subject to harmless error analysis. *Rushen* v. *Spain*, 464 U.S. 114, 129, n.8 (1983) (STEVENS, J., concurring). The defendant was *totally*

excluded. This violation is significantly different from other confrontation violations which generally involve the erroneous introduction or exclusion of specific evidence.

Even if a harmless error analysis is made, it is clear that the error in this case could not have been harmless beyond a reasonable doubt. Defense counsel was thoroughly frustrated in his efforts to cross-examine the witnesses in front of the jury. The competency of the witnesses was extremely suspect and the cross-examination, in effect, had to be terminated. Furthermore, the evidence against respondent was open to grave doubt. There was no physical or medical evidence introduced to show that the children had been sodomized. This was essentially a "swearing contest" and the competency of the witnesses was the most critical factor.

This Court should not have granted certiorari in this case because the opinion of the Kentucky Supreme Court rested on adequate independent state grounds. Even under the standard of *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court should not have granted review. The majority opinion of the Kentucky Supreme Court notes that "the Eleventh Section . . . of the Kentucky Constitution guarantees the accused the right . . . to meet the witnesses (against him) face to face." *Stincer* v. *Commonwealth*, 712 S.W.2d 939, 940 (Ky. 1986) (J.A. 82). The opinion also states that respondent "was denied his constitutional right to meet the witnesses face to face" (J.A. 83). Absolutely no federal cases are cited in the majority opinion. Certiorari was improvidently granted in this case since no federal question was presented.

ARGUMENT

I.

THE OPINION OF THE KENTUCKY SUPREME COURT SHOULD BE AFFIRMED SINCE THE EXCLUSION OF RESPONDENT BY THE TRIAL COURT FROM THE COMPETENCY HEARING VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondent will argue in this brief that his exclusion from the competency hearing of the witnesses, prior to their testi-

mony, violated his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution. Respondent wishes to emphasize, initially, that he believes that the opinion of the Kentucky Supreme Court rests on adequate independent state grounds. As respondent will argue later in this brief, the opinion rests primarily upon Section 11 of the Kentucky Constitution. In spite of respondent's argument to this effect in his response to the petition for certiorari, this Court has granted certiorari and respondent will explain how the action of the trial court in this case violated respondent's federal constitutional rights.

Respondent vigorously asserts that, even if only federal constitutional principles are applied to this case, there is no doubt that a violation of those rights has occurred. By excluding the respondent personally from the hearing, the trial court violated his right to confront his accusers under the Sixth and Fourteenth Amendments to the United States Constitution. It is also submitted that respondent's right to the effective assistance of counsel, under the Sixth Amendment, was abridged. In addition, respondent will show that his right to due process of law, under the Fourteenth Amendment, was violated in this case as well.

A. Respondent's Confrontation Right Under The Sixth Amendment Was Violated

The Sixth Amendment reads, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

The right of confronation was made applicable to the states by this Court in *Pointer* v. *State of Texas*, 380 U.S. 400, 403 (1965). The trial court in the case at bar deprived respondent of the opportunity to confront his princple accusers. Respondent was convicted of sodomizing T.M.G. and P.M.G. They were the most critical witnesses against him. Yet, he was not permitted to attend the critical hearing which, under Kentucky law,[7] was

[7] *Capps* v. *Commonwealth*, 560 S.W.2d 559, 560 (Ky. 1977), quoting *Moore* v. *Commonwealth*, 384 S.W.2d 498, 500 (Ky. 1964).

required to be held in order to determine whether the witnesses were competent to testify in front of the jury.

1. General Case Law.

As this Court noted in *Delaware* v. *Fensterer*, 474 U.S. ——, 106 S.Ct. 292, 294 (1985) (per curiam), the majority of cases involving the confrontation clause "fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination." The issue facing the Court in this case falls more closely into the second category; however, the case law relevant to both categories is important to the resolution of this issue.

The right of the accused to be present during the trial of a capital case was articulated by this Court in *Lewis* v. *United States*, 146 U.S. 370 (1892).[8] In *Mattox* v. *United States*, 156 U.S. 237, 242 (1895), a case cited many times since, this Court explained that the Sixth Amendment was meant to assure that the defendant in a criminal case has the right to confront the witnesses against him "face to face," instead of by "depositions or ex parte affidavits." These early cases in regard to the right to confrontation stressed the importance of "face to face" confrontation. See *Dowdell* v. *United States*, 221 U.S. 325, 330 (1911).

These decisions are important to the resolution of this case in spite of the fact that the instant case does not concern the introduction of hearsay or the introduction of testimony from a prior proceeding. Because of the critical nature of the competency hearing, the prior decisions of this Court ensuring the right of the accused to confront his accusers "face to face" are relevant.

[8] The case does not directly mention the Sixth Amendment, rather it is concerned with "the right to be personally present during the trial," *Id.*, at 372, and the right to confront jurors "face to face." *Id.*, at 375.

In *Barber* v. *Page*, 390 U.S. 719, 721 (1968), this Court reenforced the *Mattox* principle and held that a state trial court had committed reversible error by reading the preliminary hearing testimony of a witness at trial when no effort had been made to obtain the presence of that witness at the trial. The same rationale was utilized in *Bruton* v. *United States*, 391 U.S. 123 (1968) wherein this Court prohibited the introduction of a codefendant's confession at trial where the codefendant was not present and subject to cross-examination.[9]

More recently, in *Lee* v. *Illinois*, ____ U.S. ____, 106 S.Ct. 2056 (1986), this Court reiterated its commitment to Sixth Amendment principles of confrontation and cross-examination by reversing a state murder conviction because of the admission of an out of court confession by a codefendant.

The central theme of the cases interpreting and applying the confrontation clause is the right of the accused to cross-examine adverse witnesses in criminal cases. "[T]he right of cross-examination is 'one of the safeguards essential to a fair trial.'" *Pointer* v. *State of Texas*, 380 U.S. 400, 404 (1965), quoting *Alford* v. *United States*, 282 U.S. 687, 692 (1931). Being deprived of the right to cross-examine an adverse witness is a constitutional violation of the first magnitude. The "denial or significant diminution [of the right of cross-examination] calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973), quoting *Berger* v. *California*, 393 U.S. 314, 315 (1969). The right to

[9] There have, historically, been cases where out-of-court statements or hearsay evidence have been admitted. But in those cases, this Court has emphasized that the accused had either cross-examined or had the opportunity to cross-examine the person making the statement at the time such statement was made. *Ohio* v. *Roberts*, 448 U.S. 56, 70-71 (1980); *Mattox* v. *United States*, *supra*. It has also been held that an accused can waive his right to confront his accusers. *Illinois* v. *Allen*, 397 U.S. 337 (1970). None of these cases represent any abandonment or diminishment of the traditional right, under the Sixth Amendment, to confront witnesses in a criminal case "face to face."

cross-examine adverse witnesses is a right which cannot really be separated from the general right of confrontation itself. This Court has held that the right of confrontation "helps assure the 'accuracy of the truth-determining process.'" *Chambers*, at 295, quoting *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970).

The right of cross-examination is central to the scope of the confrontation clause. "Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.'" *Davis* v. *Alaska*, 415 U.S. 308, 315 (1974), quoting *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965).

The basic Sixth Amendment right of the accused to be present at "every stage of his trial" was addressed in *Illinois* v. *Allen*, 397 U.S. 337 (1970). The Court emphasized that this right is obligatory upon the states, is basic and fundamental, but may be waived or lost by disruptive or contumacious behavior on the part of a criminal defendant. This case supports respondent's position since it emphasizes that this basic fundamental right can only be lost through some action on the part of the defendant. In the instant case, of course, there was no finding or statement by the trial court that respondent had either waived his presence at the hearing or had forfeited it through his conduct.

2. Respondent's Right Of Confrontation Was Violated In This Case.

The position of the Commonwealth, in regard to the issue of confrontation, is that the competency hearing is not a proceeding critical to the guilt or innocence of the accused and that he has no Sixth Amendment right to confront the witnesses at this hearing. The Commonwealth asserts that only those proceedings actually in front of the jury are subject to the Sixth Amendment right of confrontation. Respondent strenuously disagrees.

The Commonwealth quotes from this Court's opinion in *Barber* v. *Page*, *supra*, at 725, wherein it was held that "[t]he right to confrontation is basically a trial right." (Brief for Petitioner,

15) Respondent does not dispute that the right to confrontation is principally concerned with meeting adverse witnesses during trial proceedings. But the competency hearing which was held in this case was most certainly a trial proceeding. The jury had already been sworn (TE 12). The competency hearing, furthermore, is an inherent and indispensable part of the trial process. Under Kentucky law,[10] the competency hearing was required before the witnesses could testify in front of the jury. The testimony of the witnesses at the competency hearing is of such vital importance to the defendant and to the "accuracy of the truth determining process," *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985), that it cannot be severed from the testimony the witness offers in front of the jury. Without the initial determination of competency, the witness could not testify at all. The testimony of these minor witnesses formed the core of the case against respondent. The issue of their competency was in no way ancillary or severable to their actual trial testimony.

The state maintains that the confrontation clause pertains only to the testimony of adverse witnesses which is presented directly to the jury regarding the ultimate issue of guilt or innocence. Respondent disagrees and submits that there is no precedent or language from the cases of this Court which would so narrowly limit the application of the confrontation clause. While the right to confrontation "is basically a trial right," the competency evaluation is most definitely a trial proceeding. Furthermore, there is no question but that the judge is the

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[10] Kentucky Revised Statute (KRS) 421.200 states that ". . . [e]very person is competent to testify for himself or another, unless he be found by the court incapable of understanding the facts concerning which his testimony is offered." In *Capps* v. *Commonwealth*, 560 S.W.2d 559, 560 (Ky. 1977), the Kentucky Supreme Court, quoting *Moore* v. *Commonwealth*, 384 S.W.2d 498, 500 (Ky. 1964), held that "[w]hen the competency of an infant to testify is properly raised it is then the duty of the trial court to carefully examine the witness to ascertain whether she [or he] is sufficiently intelligent to observe, recollect and narrate the facts and has a moral sense of obligation to speak the truth."

trier of fact at the competency determination.[11] The question of competency is essentially a mixed question of law and fact. In a competency proceeding the judge is eliciting facts from the child in order to arrive at his conclusion of law. He is the sole adjudicator of the facts as they relate to whether the witness is competent to testify. Because the judge is acting in an adjudicatory role at the competency hearing, and because it is the judge, and not the jury, which assumes this role, the right of confrontation attaches at the competency hearing.[12] In Kentucky, when the competency of an infant is challenged, the Court must find that the potential witness is capable of "understanding the facts concerning which his testimony is offered." KRS 421.200. The trial court must "ascertain whether [the witness] is sufficiently intelligent to observe, recollect and narrate the facts and has a moral sense of obligation to speak the truth." *Moore* v. *Commonwealth*, *supra*. In order to reach that legal conclusion, the judge must entertain and ascertain

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[11] Although Kentucky has not adopted the Federal Rules of Evidence, the following language from the Advisory Committee is instructive:

> The applicability of a particular rule of evidence often depends upon the existence of a condition . . .
>
> * * *
>
> To the extent that these inquiries are factual, the judge acts as a trier of fact.

Fed. Rules Evid. Rule 104, 28 U.S.C.A., Notes of Advisory Committee on Proposed Rules, Note to Subdivision (a).

[12] In *LaChappelle* v. *Moran*, 699 F.2d 560, 565 (1st Cir. 1983), the Court of Appeals held that the confrontation rights of the defendant were not violated by an in camera conference between the judge and the prosecutrix in a rape case. The judge's conversation with the young woman in chambers concerned whether she was reluctant to testify because of embarrassment. The federal Court of Appeals held that "[t]he judge was not performing in an adjudicatory role at the conference: he was not resolving any issue of fact or law in the state's criminal case against the defendant, nor was he instructing the jury concerning the case or its own role." Such is clearly not the situation in the case at bar.

factual matters. Therefore, it is the court which is acting as a trier of fact in this important matter.

There are two principal facets to the confrontation violation which occurred in this case. First of all, by depriving respondent of being present at the competency hearing, the trial court severely undermined the "reliability" factor inherent in the Sixth Amendment. There is no doubt that the trier of fact, the judge, can obtain a truer and more valid understanding of the demeanor of a witness if the witness is facing the accused when a determination of competency is made. This is particularly true when that witness is, in fact, going to be facing the accused when testifying before the jury. The judge is presented with an invalid conception of the witness' true reliability when that witness' competency is evaluated outside the presence of the accused. "Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face to face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel." *United States* v. *Benfield*, 593 F.2d 815, 821 (8th Cir. 1979).

This "reliability" factor is particularly striking in this case. T.M.G. and P.N.G. were examined for competency outside of the presence of the accused. The court determined that they were competent based upon the questions asked at the hearing. Respondent was not present, but his counsel asked questions. The children, apparently, were not upset at the hearing. But later, at trial, they appeared to be quite upset. Although it is impossible to know why they became upset, the fact remains that they could not be cross-examined. There were glaring inconsistencies and falsehoods which were evident in their testimony. Furthermore, their testimony in front of the jury strongly indicated that they were not competent. But because the initial competency determination was made outside of the presence of respondent, an invalid and inaccurate picture was given as to the competency of these witnesses. In addition, respondent was placed in a fundamentally unfair situation. The witnesses were adjudged to be fully competent to testify, yet, they could not be cross-examined. Even assuming that it was

the presence of the accused which resulted in this inability to cross-examine, the fact remains that it was fundamentally unfair to determine the competency of the witnesses in one atmosphere and then expose them to the jury in an entirely different atmosphere.[13]

The second facet of the confrontation violation which occurred in this case concerned the impairment of the ability of the defense to cross-examine the witnesses at the competency hearing. In this case, respondent was not permitted to attend the competency hearing. Therefore, his fundamental and critical right to cross-examine the witnesses was impaired. Although the trial court permitted the defense attorney to engage in cross-examination, respondent had no opportunity to consult with his attorney or to assist him. He had no opportunity to see or hear the responses of the witnesses and had no opportunity to provide input or to help formulate any strategy for adequate cross-examination.[14]

It cannot be maintained that, because respondent had the opportunity to later cross-examine the witnesses in front of the jury, the right to cross-examination was adequately preserved.

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[13] Under Kentucky law, as it now exists, the testimony of these witnesses could be prerecorded or taken by closed circuit television out of the presence of the defendant. KRS 421.350. This law went into effect approximately six months after respondent's trial. That would, at least, alleviate the problem of allowing the children's competency to be determined outside of the presence of the accused and then expect them to testify in front of the jury in the presence of the accused. While respondent makes no comment upon the constitutionality of the closed circuit or videotape statutes, the important point, in regard to this case, is that the procedure which was utilized was fundamentally unfair to the defendant.

[14] This argument, of course, directly relates to the issue of whether the action of the trial court violated respondent's right to due process and the effective assistance of counsel. This will be pursued later in the brief, but for purposes of the issue of confrontation it is important to note that the right of cross-examination, an inherent element of the right of confrontation, was irreparably impaired by the action of the trial court.

The issue *before the jury* was not the competency of the witnesses to testify. Once that determination was made by the court, the jury was allowed to hear the witnesses' testimony regarding the substance of the charges. Even tough and thorough cross-examination may fail to rectify the damage and injustice of allowing incompetent witnesses to testify in front of the jury. This is particularly true when those witnesses are children. By not permitting the defendant to be present at the competency hearing, the opportunity for effective cross-examination at the hearing is lacking. The defendant is thus placed in an extremely unenviable and unfair position. There may well be facts which ought to have been explored at the hearing, but were not because the defendant was not present. Unless the defense wishes to abandon such inquiry, the issue must then be raised anew in front of the jury. Quite often, these types of questions do not concern the substance of the charges, but other events which may show that the child is incompetent. By having to pursue this line of inquiry in front of the jury, the defendant needlessly risks alienating the jury on matters which seem to have no relevancy to the case.[15]

It is difficult to understand how the Commonwealth can argue that there is no right to confrontation and cross-exam-

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[15] In *Smith* v. *United States*, 414 A.2d 1189, 1199 (D.C. App. 1980), the trial court denied the defense the opportunity to cross-examine a child witness during a competency hearing. Although the appellate court deemed the error harmless, the language of the court is helpful to the resolution of this issue.

> It is no answer to say that defense counsel's opportunity to cross-examine the witness at trial, in front of the jury, cured any possible constitutional infirmity. Without having an opportunity, through cross-examination, to challenge the government's effort to demonstrate competency during *voir dire*, defense counsel was forced to choose, at trial, between pressing Latita Simms about her capacity to tell the truth and to recall events in 1973 (as he would have during *voir dire*) and taking a less severe approach toward her in front of the jury (the course he chose at trial). This was fundamentally unfair, since it put the defendant in a position of having to risk jury hostility in order to ask the kinds of questions commonly used to ferret out a child's inability to perceive or tell the truth, or to recall long past events.

ination at the competency hearing. Because respondent was excluded from the hearing, the reliability of the trial court's determination of competency was undermined and the right of cross-examination wa irreparably impaired.

Respondent's purpose at the hearing was not "the idle purpose of gazing upon the witness[es], or of being gazed upon by [them], but . . . the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." *Davis* v. *Alaska*, *supra*, at 316, quoting 5 J. Wigmore, Evidence, (§ 1395, at 123 (3d ed. 1940).

The fact that respondent's attorney was permitted to be present at the competency hearing and ask questions does not alleviate or dilute the Sixth Amendment confrontation problem. Respondent had the right to be present. As this Court so aptly stated in *Faretta* v. *California*, 422 U.S. 806, 819 (1975):

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor" . . . The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

The law in this country has always favored a "face-to-face" confrontation between the accused and the accusers. "While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment."[16] Respondent submits that the right of face to face confrontation is a concept which still applies as much in the 1980's as it did in the 1790's. Although technological advancements of the twentieth cen-

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[16] *United States* v. *Benfield*, *supra*., at 821.

tury[17] may alter the interpretation of the concept of "face to face" confrontation, there is still no substitute for the right of the criminal defendant to see and hear the witnesses against him and to have the opportunity for effective cross-examination. While some substitutions or variations of the "face to face" requirement may be permissible, it must be emphasized that in the instant case respondent was *totally* deprived of the opportunity to see or hear the testimony of the witnesses during the competency hearing.

The Commonwealth cites several cases which, it maintains, support the argument that the confrontation clause is not applicable to competency hearings (Brief for Petitioner, 17-18). *McCray* v. *Illinois*, 386 U.S. 300 (1967) is certainly not on point since it involves the right of the defense to learn the identity of a confidential informant. This Court has never held that a criminal defendant has such an automatic right. *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), also cited by the Commonwealth, held that the right to counsel did not attach at a probable cause hearing which, under Florida law, was limited in its function and nonadversarial in character. If anything, *Gerstein* supports respondent's position because it discusses what has traditionally been identified by this Court as a "critical stage." A "critical stage" has been defined as "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." *Id.*, at 122, citing *Coleman* v. *Alabama*, 399 U.S. 1 (1970); *United States* v. *Wade*, 388 U.S. 218, 226-227 (1967). As the Court further noted in *Gerstein*, if no probable cause had been found in *Coleman*, the accused "would not [have been] tried at all." *Id.*, at 123. There is no doubt that in the instant case the competency hearing was a critical stage of the proceedings because a finding of no competency would have meant there would have been insuffi-

[17] As will be further explored later in this brief, many states now have videotape laws and closed circuit television procedures whereby an accused may see and hear all proceedings against him without the witness having to view the defendant. Such a statute, KRS 421.350, went into effect in Kentucky approximately six months after respondent's trial.

cient evidence against the accused. *Nelson* v. *O'Neil*, 402 U.S. 622 (1971), which held that the admission of an out-of-court statement of a codefendant is not reversible error where the codefendant takes the stand and can be cross-examined at trial, is also inapplicable. The error in the case at bar occurred in the procedure used by the trial court before the witnesses ever appeared in front of the jury. The fact that they were later "cross-examined"[18] is irrelevant if the procedure used to determine competency was unconstitutional.

The Commonwealth cites a number of state cases which have held that the defendant is not entitled to be present at the competency hearing of a minor witness (Brief for Petitioner, 20-22). These cases are premised on the theory that the defendant's presence at the hearing is not necessary and serves no useful purpose.[19] This premise is fundamentally invalid. The competency hearing is a vital stage of the trial and the presence of the defendant assists the court at arriving at a fair and reliable conclusion as to the competency of the witness. Furthermore, the defendant can contribute immensely to his own defense by being present and assisting his attorney in cross-examination.

Respondent urges this Court to adopt the reasoning of the Chief Judge of the Minnesota Court of Appeals who, although concurring in the result of *Moll* v. *State*, *supra*, nevertheless disagreed with that Court's holding in regard to the issue of the

[18] The cross-examination in this case, of course, was an exercise in futility due largely to the fact that the young witnesses may, indeed, have been incompetent.

[19] *Moll* v. *State*, 351 N.W.2d 639, 644 (Minn. App. 1984) held that "[t]he presence of a defendant would serve no purpose other than to intimidate the child because the form of inquiry at a competency hearing is within the sound discretion of the trial judge." In *State* v. *Taylor*, 704 P.2d 443, 448 (N.M. App. 1985), the court relied heavily on *Moll*. *People* v. *Breitweiser*, 349 N.E.2d 454, 456 (Ill. App. 1976) relied on the fact that the witness would later be cross-examined in front of the jury and, therefore, it was not error to exclude him from the competency hearing or to limit his attorney's cross-examination.

defendant's presence at the competency hearing. He correctly noted that the determination of competency ". . . affected the substantial rights of the appellant. Had the trial court determined the children were not competent, there may have been no trial." *Id.*, at 645 (Popovich, C.J., concurring specially). Chief Judge Popovich noted that "a separate competency hearing need not be held, but if held, the defendant and defense counsel have the right to be present." *Id.*, at 647.[20] Respondent urges this Court to adopt the position of the concurring judge in *Moll* and hold that the defendant has a constitutional right to be present at the hearing. See also *State* v. *Warford*, 389 N.W.2d 575, 582 (Neb. 1986) (defendant "must be given notice and an opportunity to attend" child competency hearing).

The concurring opinion in *Moll* states that if a competency hearing is held, the defendant and defense counsel have the right to be present. The opinion further states that the trial court may require counsel to submit their questions through the court in order to minimize any intimidation to the child. Respondent emphasizes that even if this approach is taken, the defendant has the right to be present, hear the answers, and propose questions to be asked.[21]

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[20] Chief Judge Popovich also refers to *State* v. *Cermak*, 350 N.W.2d 328, 333 (Minn. 1984) wherein the Minnesota Supreme Court plainly acknowledged the "constitutional right" of the defendant to be present at the competency hearing of child witnesses. The Minnesota Court of Appeals in *Moll* dismisses that portion of *Cermak* as being only dictum. But respondent calls this Court's attention to the fact that neither side in *Moll* sought review to the Minnesota Supreme Court.

[21] *See Commonwealth* v. *Doucette*, 496 N.E.2d 837, 839-840 (Mass. App. Ct. 1986) wherein the Court held that both counsel and the defendant had a right to be present at a hearing to determine whether witnesses with histories of mental illness were competent to testify in front of the jury. The Court held that counsel and the defendant had the right to be present and propose questions to be asked by the judge. The Court, citing *Smith* v. *United States*, 414 A.2d 1189, 1199 (D.C. App. 1980), stated that the "right of presence, so that questions may at least be suggested to the judge, recognizes

Another aspect of the Sixth Amendment which must be considered is the right of every criminal defendant to self-representation in state court proceedings. This has been held to be an absolute right under the Sixth Amendment as made applicable to the states by the Fourteenth Amendment. *Faretta* v. *California*, *supra*, at 807. If this Court holds that a defendant has no right to be present at the competency hearing, there will then arise the inevitable dilemma of the defendant electing to represent himself or herself at trial. Any restriction or limitation on the defendant's right to self-representation would be a violation of the Sixth Amendment and of this Court's prior cases.

In *In re Little*, 404 U.S. 553, 555 (1972), this Court held that a defendant representing himself was "clearly entitled to as much latitude in conducting his defense as . . . is enjoyed by counsel vigorously espousing a client's cause." In *McKaskle* v. *Wiggins*, 465 U.S. 168, 174 (1984), this Court held that "[t]he

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that once a witness is qualified to testify, the right to cross-examination is, from the defendant's vantage, second best; it becomes an exercise in damage control." The Court in *Doucette* further held that once a judge has permitted the prosecution to examine a prospective witness as to competence, the defense has a right to also examine the witness. In the case at bar, the judge held a competency hearing and allowed the attorneys to cross-examine the witnesses. While respondent is aware that some states have eliminated competency hearings altogether, the fact remains that Kentucky had such a hearing in this case and the attorneys were permitted to ask questions. Therefore, respondent had the right to be present and assist his attorney in whatever cross-examination was necessary. Because the competency hearing is a critical stage of the proceedings, the right to counsel and the right to cross-examination are present. Even if the competency hearing itself is not constitutionally required, once a state elects to proceed in this manner, elementary principles of due process and constitutional law require that the rights of the defendant be protected. "[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts* v. *Lucey*, 469 U.S. 387, 401 (1985).

pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial." Absent some showing that the defendant intends to be disruptive or contumacious, there is no doubt that the defendant is entitled to act as his own advocate in all respects.

If this Court holds that the defendant is not allowed to be present at the competency hearing, the defendant could frustrate this judicial procedure by requesting to defend himself at trial. The defendant in these types of cases is thus faced with the dilemma of either forfeiting the right to counsel or forfeiting the right to confrontation. If the defendant elects to give up the right of counsel, he would then maintain the right to be present at the competency hearing and confront the witnesses. If the defendant elects to be represented by counsel, he would forgo the right to confront the witnesses at the hearing. This situation is fundamentally unfair. This Court has held that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons* v. *United States*, 390 U.S. 377, 394 (1968). This Court can assure that this inequity does not occur by simply holding that the defendant can not personally be prohibited from attending the competency hearing in these types of cases.

Respondent's Sixth Amendment right of confrontation was violated in this case and the opinion of the Kentucky Supreme Court should be affirmed.

B. Respondent's Due Process Rights Under The Fourteenth Amendment Were Violated

By excluding him from the competency hearing, the trial court curtailed respondent's opportunity to assist in his own defense at a most critical phase of his trial. This was a violation of due process.[22] The Fourteenth Amendment, Section 1, guarantees that no state "shall . . . deprive any person of . . . liberty . . . without due process of law . . ."

[22] Petitioner states that due process was not argued by respondent in the state court. That is incorrect. Although the opinion of the Kentucky Supreme Court does not mention due process, it was raised in respondent's brief to that Court (Brief for Appellant 14, 17).

1. Case Law

The leading case, and the one most often cited, concerning the due process rights of an accused to attend criminal proceedings is *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934). The Court held that a defendant "in a prosecution for a felony . . . has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Id.*, at 105-106. The Court cited a number of earlier cases and emphasized that the "defense may be made easier if the accused is permitted to be present . . . for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself." *Id.*, at 106. In *Snyder*, the Court held that the defendant had no due process right to attend a jury view of the scene of the crime. But *Snyder* does not help the Commonwealth in this case. *Snyder* had nothing to do with the questioning of prosecution witnesses. The jury view was not a proceeding where testimony was being introduced or taken. It was not a proceeding where the defendant could have offered any assistance to his attorney.

This Court recognized as early as 1884 that an accused has a due process right to be present at "every stage of the trial when his substantial rights may be affected by the proceedings against him." *Hopt* v. *Utah*, 110 U.S. 574, 579 (1884). The foregoing language was quoted in *Schwab* v. *Berggren*, 143 U.S. 442, 448-449 (1892), wherein this Court held that the right of presence did not extend to appellate proceedings. Although not couched in constitutional terms, see also *Rogers* v. *United States*, 422 U.S. 35, 39 (1975) and *Shields* v. *United States*, 273 U.S. 583, 588-589 (1927).

The right to presence, although not expressly found in any portion of the constitution, is recognized as an essential element of due process. *See Faretta* v. *California*, 422 U.S. 806, 819, n.15 (1975). *Snyder* v. *Massachusetts*, *supra*, was recently

quoted by this Court in *United States* v. *Gagnon*, 470 U.S. 522, 526 (1985) (per curiam) wherein this Court held that due process was not violated by the exclusion of the defendant from an in-camera hearing regarding a juror's concern that the defendant was sketching portraits of the jury during trial. *Gagnon*, of course, like *Snyder*, did not involve any of the witnesses.

This Court has held that, although fundamental, the right to presence can be waived by an accused [*Taylor* v. *United States*, 414 U.S. 17 (1973)] as well as forfeited through disruptive behavior in the courtroom [*Illinois* v. *Allen*, 397 U.S. 337 (1970)]. In this case, of course, there is no issue as to whether the defendant's presence was waived or lost due to disruptive behavior. Respondent personally asserted his right to be present at the trial. There is no evidence that he misbehaved in any way or forfeited his right to be present by his conduct.

2. Respondent's Due Process Rights Were Violated In This Case

The simple question in regard to the issue of due process is whether the presence of respondent, at the competency hearing, bore "a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder* v. *Massachusetts*, *supra*, at 105-106. Respondent strenuously submits that his presence had a direct and significant effect on the "fullness of his opportunity to defend."

The only way for the judge to adequately arrive at a legal conclusion in regard to competency is through factual questions propounded to the witnesses. Unless the accused is present, and has the right of cross-examination, how is the court to know or be shown if the witness is lying about any or all of the factual matters being asked?

The trial judge generally limits the questioning to such matters as school, teachers, church, and the like. But the defendant may well know about other legitimate areas of inquiry of which counsel or the court may not be aware. If the

defendant is not present, his input cannot be provided.[23] There is no question that the presence of the accused is needed in this situation. There is no other way for the trial court to adequately "test[ ] the recollection [or] sift[ ] the conscience of the witness." *Mattox* v. *United States*, *supra*, 156 U.S., at 242.

It is difficult to understand how the Commonwealth can maintain that respondent's presence at the competency hearing could not have benefited his defense and that his presence there would have been "useless or 'but a shadow.'" (Brief for Petitioner, 23). When a child's competency is challenged, a hearing is held. The court *must ascertain* that a witness is competent in order to allow that witness to testify. While the decision as to whether an individual witness is competent is addressed to the discretion of the trial court,[24] the fact remains that Kentucky, like most states, has a specific procedure for arriving at that determination. That procedure, it is strenuously submitted, must comport with the constitution. Where matters of competency are concerned, it is the defendant in

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[23] Respondent is aware that, at a competency hearing, the narrow issue is not whether the child is telling the truth, but rather whether the child understands the difference between truth and falsity. But, in practicality, that is a distinction without a difference. If a child continuously answers factual questions at the hearing untruthfully, that is strong evidence that the child may not really understand the difference between truth and lying. Specific instances of untruthfulness in the past may be further evidence. Furthermore, the only way to know whether a child is answering truthfully is for the defendant to be present and able to assist in the questioning.

[24] While the trial court exercises much discretion in this area, it is submitted that a clear abuse of discretion would be reversible error and could, in certain cases, amount to a violation of due process if an obviously incompetent witness was allowed to testify. *See Evans* v. *Hettich*, 20 U.S. 453 (1822); *District of Columbia* v. *Armes*, 107 U.S. 519 (1883). Of course, whether this would actually amount to a violation of due process is not the issue. The state has provided a vehicle for determining whether a witness is competent and the issue is whether the procedure of excluding the defendant from the hearing deprives him of an opportunity to contribute to his own defense.

most cases, who is most able to know whether a child is telling the truth about such matters as school, church and family. It is the defendant who would be most cognizant of other areas of inquiry as well. In many cases, it would simply be an exercise in futility for a defense attorney to cross-examine a witness at the competency hearing without having the input and assistance which the defendant could provide. A child could say almost anything and neither the court nor counsel would have any way of knowing if the statements were true.

A defendant in a criminal case has a Sixth Amendment and due process right "to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence." *Faretta* v. *California*, *supra*, at 816 (1975). This right is "based upon the premise that the 'defense may be made easier' if the accused is permitted to be present. . . ." *Id.*, at 816, quoting *Snyder* v. *Massachusetts*, *supra*, at 106. A defendant at this stage of the proceedings has much to contribute. Respondent's right to due process has been violated and this Court should so hold.

C. Respondent's Right To Effective Assistance Of Counsel Under The Sixth Amendment Was Violated.

The ruling of the trial court excluding respondent personally from the competency hearing was a deprivation of his right to effective assistance of counsel under the Sixth Amendment.[25]

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[25] It is conceded that this particular *aspect* of the Sixth Amendment was not raised in the Kentucky Supreme Court and was not made a part of the opinion. But because respondent is "support[ing] the judgment" of the Kentucky Supreme Court, it is submitted that this Court can review this aspect of the Sixth Amendment. *McGoldrick* v. *Compagnie Generale*, 309 U.S. 430, 434 (1940), citing *United States* v. *American Railway Express Com.*, 265 U.S. 425, 435 (1924). See also *Dandridge* v. *Williams*, 397 U.S. 471, 475, n.6 (1970) which states that "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon on or even considered by the trial court." Respondent is aware that in *Heckler* v. *Campbell*, 461 U.S. 458, 468, n.12 (1983), this Court stated that, under such circumstances, review would be granted "only in exceptional cases" [quoting *McGoldrick* at 434]. Respondent urges this Court to review the issue of effective assistance of counsel in this case. It is a part of the Sixth Amendment which was most certainly raised in the state court and which is addressed in the opinion of the Kentucky Supreme Court. Furthermore, it is an inherent and inseparable part of the argument regarding the right to cross-examine witnesses and the due process right to assist, in a meaningful way, in one's own defense.

The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

1. Case Law

In *Glasser* v. *United States*, 315 U.S. 60, 69-70 (1942), this Court, quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938), held that the assistance of counsel "is one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty . . ." The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment due process clause. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). In *McMann* v. *Richardson*, 397 U.S. 759, 771, n. 14 (1970), this Court held that the right to counsel meant "effective assistance of counsel."

There is no doubt that the right to counsel exists not just at trial, but at all "critical stages . . . that would impair defense on the merits if the accused is required to proceed without counsel." *Gerstein* v. *Pugh*, 420 U.S. 103, 122 (1975). In *Coleman* v. *Alabama*, 399 U.S. 1, 9 (1970), this Court held that a preliminary hearing was a critical stage since an insufficient showing by the prosecution would result in the defendant not being bound over to the grand jury. In *United States* v. *Wade*, 388 U.S. 218, 225 (1967), this Court held that the right to counsel existed "whenever necessary to assure a meaningful 'defence.'" In *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967), this Court described the right to counsel as being applicable "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."

In this case, the trial court's exclusion of the defendant from the competency hearing prevented him from consulting with his attorney during that hearing and during counsel's questioning of the witnesses at the hearing. The decision-making ability of counsel was thus impaired.

> Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.

Strickland v. *Washington*, 466 U.S. 668, 686 (1984).

This Court has not been reluctant to find Sixth Amendment violations where the state or federal government imposes restrictions on the ability of defense counsel to effectively function. In *Geders* v. *United States*, 425 U.S. 80, 91 (1976), this Court held that the Sixth Amendment was violated by the trial court's order to defense counsel not to consult with the defendant during an overnight recess which occurred during cross-examination. The Court held:

> To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in a trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, . . . the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel.

Similarly, any conflict which exists between respondent's right to consult with his attorney during the competency hearing and the "right" of the witnesses to testify at the competency hearing out of the presence of the accused must be resolved in favor of the right to effective assistance of counsel.

2. The Right To Counsel Was Violated In This Case

Because respondent was personally excluded from the competency hearing, he was unable to see or hear the witnesses' answers to the questions posed by the court and by counsel. He was unable to advise his attorney how to proceed and he was unable to note any inaccuracies or untruths in the answers given by the witnesses. Furthermore, there may well have

been specific questions which could have been asked, but were not, because defense counsel was not aware of them. Because respondent's attorney was deprived of his input, respondent's right to counsel was violated at this hearing.

There is no doubt that the action of the trial court "interfere[d] . . . with the ability of counsel to make independent decisions" regarding how to proceed at the competency hearing. *Strickland* v. *Washington*, *supra*, at 686. Defense counsel could not be expected to know, in effect, the life history of the witnesses.[26]

It is unnecessary and, in fact, futile to expect or require respondent to now show precisely what counsel would have done or asked had respondent been at the hearing. Because respondent was excluded from the hearing, no such showing need be made. The important point is that respondent wished to be there and had the right to be there. Respondent's exclusion from the hearing deprived him of effective assistance of counsel at a critical stage of his trial. Under such circumstances, there can be no doubt that the "trial [was] unfair." *United States* v. *Cronic*, 466 U.S. 648, 659 (1984). This Court has described the right to counsel as "the right of the accused to have counsel acting as his assistant." *United States* v. *Ashe*, 413 U.S. 300, 312 (1973). Counsel could not have been acting as the

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[26] As has been pointed out previously, it is insufficient for the Commonwealth to argue that these things could have been probed later on cross-examination. The record plainly reveals that respondent's counsel was throughly frustrated in his attempts to cross-examine these children. Furthermore, the damage is already done once the court determines a witness to be competent and permits that witness to testify in front of the jury. If a witness is incompetent, the defense should have the opportunity to demonstrate that before the jury is provided with extremely damaging testimony. As has also been pointed out, it is fundamentally unfair to force the defendant to "retry" the issue of competency before the jury. For the defendant to have to go back and cross-examine the child on matters such as Sunday school and teachers would undoubtedly alienate the jury and would detract from the cross-examination on the substance of the charges.

spokesman for or advisor to respondent since counsel was deprived of respondent's input and had no way of knowing whether the witnesses were answering these factual questions in a truthful manner. Counsel was hamstrung at this hearing and was rendered ineffective by the action of the trial court. The competency hearing was a "critical stage" of the proceedings because a finding of incompetency on the part of the witnesses would have meant, quite likely, that respondent would not have been tried. *Gerstein* v. *Pugh*, *supra*, at 123. Respondent had the right to the effective assistance of counsel at this hearing and, because he was excluded, his right to counsel under the Sixth Amendment has been abridged.[27]

D. A Balancing Of Interests Weighs In Favor Of Respondent

The Commonwealth argues that, even if this Court decides that the right of confrontation extends to competency hearings, a balancing test should be utilized and this Court should hold that the interest of the state in prosecuting these types of cases outweighs the interest of the defendant in being present at the hearing. Respondent strenuously disagrees.

The Commonwealth's argument centers on its contention that the effects of children testifying in these types of cases are

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[27] In *Strickland* v. *Washington*, *supra*, this Court held that, in order to show prejudice when ineffective assistance of counsel is claimed, the accused must show that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. This standard is not applicable in this case because respondent is not claiming a "deficiency in attorney performance." *Id.* at 693. The order of the trial court excluding him from the hearing made effective representation at that hearing impossible. It is just as if counsel had not been provided at a "critical stage of the proceedings." Therefore, respondent does not have to show, in order to obtain relief, that the result would have been different had the Sixth Amendment violation not occurred. It should be pointed out, however, that even if such a standard is employed in this instance, the likelihood that a different result would have occurred is great since the witnesses demonstrated a very questionable and suspect level of competence when they were cross-examined later at trial.

so traumatic and so devastating that the ability of the state to prosecute these types of cases is being severely limited, if not crippled, by the presence of the accused at these proceedings.[28] The Commonwealth even boldly asserts that "evidence, as well as common sense, strongly suggests that the defendant's presence will be, if anything, counterproductive." (Brief for Petitioner, 25-26). The available data, however, as reflected in the legal and psychological journals, as well as in the brief of amicus curiae American Psychological Association (hereinafter, *Amicus* APA) is not nearly so supportive of petitioner's position.

> Thus far, [however,] no compelling case has been made that sexually abused children as a class are sufficiently different from other witnesses to justify abrogation of [the] long-standing attributes of [our] adversary system.

Amicus, APA, at 15, quoting Melton, *Children's Testimony in Cases of Alleged Sexual Abuse*, to be published in ADVANCES IN DEVELOPMENTAL AND BEHAVIORAL PEDIATRICS (Wolraich and Routh, eds, 1987). As amicus further notes:

> It is not self-evident that child victims of sexual abuse, for example, are at a substantially greater risk from testimony under conventional procedures than other child victims, child witnesses of violent offenses, adult victims of sexual offenses, or even witnesses in general.[29]

Established opinion within the medical and psychological communities, as to whether a child is necessarily traumatized by the courtroom, is certainly mixed. While there is authority for the theory that some children suffer fear and apprehension,

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[28] "Asking such a witness to understand, not to be afraid, and to respond in a court of law as a mature adult is asking too much in most cases." (Brief for Petitioner, 24).

[29] *Amicus* APA, at 16, quoting Melton and Thompson, *Getting Out of a Rut: Detours to Less Traveled Paths in Child Witness Research, to be published in* CHILDREN'S EYEWITNESS MEMORY (Ceci, Toglia, and Ross eds. *in press*) at 28.

there is significant authority stating that the opposite effect can occur.

> [I]t may well be that the trial experience will cause little trauma. At least for some child victims, the experience may be cathartic; it provides an opportunity for taking control of the situation, achieving vindication and symbolically putting an end to the episode.

Amicus, APA at 16-17, quoting Melton, *Sexually Abused Children and the Legal System: Some Policy Recommendations*, 13 AM.J. FAMILY THERAPY 61, 64-65 (1985). Equally unresolved is any consensus or scientific conclusion that children are less likely to testify fully and honestly if the defendant is present in the courtroom. "There are . . . plausible reasons . . . to suppose that children may benefit from testifying before their alleged offenders." *Amicus*, APA, at 24.[30] The Commonwealth's assertion that the presence of the defendant is counterproductive is certainly not unanimously supported. The Commonwealth attempts to portray this matter as being one-sided. But this is certainly not the case. The issue is not at all settled and the experts agree that where human emotions are concerned, and particularly those of a child, each case must be considered on an individual basis.

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[30] "For example, just as testifying may engender in children an enhanced sense of control over their lives, testifying before their alleged offenders may produce a sense of vindication by facilitating the resolution of conflicting feelings about the abuse, encouraging the children to see that the abuse was not their fault, and allowing children to experience the satisfaction, from their willingness to confront their abuser, of having contributed to an appropriate resolution of the case. In addition, the demonstrated role that adequate preparation plays in reducing the stress and trauma experienced by child witnesses suggests that testifying in front of their alleged offender during preliminary competency hearings in the judge's chambers—a more informal and less awesome setting than the courtroom—may serve to lessen the trauma for the child who is found competent who will eventually testify in front of the offender at trial." *Amicus*, APA, at 24-25.

Even in those cases where it can be shown that the presence of the defendant is intimidating to a child, it is submitted that the rights of a criminal defendant to confront his or her accusers must predominate. Because of the nature of the crime of sexual abuse, the courts need to be *particularly* mindful of the rights of the accused.[31] In cases of this type, even a mere allegation can have devastating effects upon a person's life. Reputations, careers and even lives can be irreparably scathed simply by an accusation. Society should do all it can to bring child sex offenders to justice, but should never forget that *justice* is the *prime* consideration. In our zeal to protect the children, care must be taken to ensure that the rights of others are not trampled.

Legitimate and well-intentioned concern for the victims of child abuse must not transform into public hysteria. Unfortunately, a "witch hunt" mentality seems to be taking effect in this country and *vital* constitutional rights are being ignored.

At least twenty-seven (27) states now have legislation allowing a child's testimony to be videotaped and shown at later proceedings.[32] At least twenty (20) states have enacted legislation allowing testimony of a child witness to be taken by live closed-circuit television.[33] These laws represent an ominous trend toward ignoring the confrontation and due process rights of defendants in these types of cases.[34] An even more ominous

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[31] Respondent certainly wishes to show no callousness toward the problem of child sex abuse. Society and the courts, understandably, wish to show compassion and empathy for the innocent victims of this crime. It is a crime which is both shocking and horrifying, and the devastating affects it can have on the family of the victim cannot be questioned.

[32] *Protecting Child Victim/Witnesses, Sample Laws and Materials*, National Legal Resource Center For Child Advocacy And Protection; ABA Young Lawyers Division (February, 1986) 31-34.

[33] *Id.*, at 35-36.

[34] Respondent takes no position in this brief whether these laws are constitutional. None of these alternative methods were employed in this case.

development is the enactment of state statutes which create specific hearsay exceptions for children in sexual abuse cases. At least eleven (11) states now have such a statute.[35] At least twenty-three (23) states have eliminated the competency qualification in these types of cases altogether.[36]

The right of the defendant to be present at the competency hearing and to assist counsel at this proceeding can be fully protected *without* jeopardizing the ability of the state to prosecute child sex offenders. The Commonwealth asks that this Court completely ignore vital and cherished constitutional rights, designed to protect the innocent as well as the guilty, in order to "accommodate a . . . class of victims . . ." (Brief for Petitioner, 28), quoting Berliner, The Child Witness: The Progress And Emerging Limitations, 40 U. OF MIAMI L. REV. 167, 179 (1985). Actual sex abuse case histories, as reflected in articles and other publications, reflect that it is not always the child who is the innocent victim. It is well known that custody battles can result in sexual abuse charges being leveled by one parent upon the other parent. Because small children can often be manipulated and are susceptible to influence, especially by parents, this type of charge is easy to make and difficult to defend.[37] The ramifications and results of this type of charge being leveled against a person cannot be ignored.[38]

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[35] Bulkley, Evidentiary And Procedural Trends In State Legislation And Other Emerging Legal Issues In Child Sexual Abuse Cases, 89 DICKINSON L. REV. 645, 667 (1985).

[36] *Id.*, at 668.

[37] Bulkley, Introduction: Background And Overview Of Child Sexual Abuse, Law Reforms in the Mid-1980's, 40 U. OF MIAMI L. REV. 5, 17, n.58, citing Paper presented by E. Benedek and D. Schetky, *Allegations of Sexual Abuse in Child Custody Cases*, Annual Meeting of the American Academy of Psychiatry and the Law, Nassau, Bahamas (Oct. 26, 1984); See also Morey, The Competency Requirement For The Child Victim of Sexual Abuse: Must We Abandon It? 40 U. OF MIAMI L. REV. 245, 247, n.6 (1985).

[38] The following actual case is illustrative of the societal problem:

> David Whiteside can't let the matter rest. For eight months he was suspected of one of the most heinous of crimes, sexually abusing his own child. His embittered wife made the accusation in the midst of a nasty custody fight, and his world fell apart . . .
>
> Ultimately, a child psychiatrist concluded that David Whiteside did not sexually abuse his son. A social worker assigned to the case concluded the same thing. Even relatives of his estranged wife came forward to say that she was making up the accusations to gain custody. And finally a judge decided that the accusations were hokum. So now the matter might seem finished.
>
> Except no court ever exonerated David Whiteside. No court can; once the most stumbling and hesitant accusation is made by a child, even if it is retracted immediately, proof of innocence can never be complete.

Morey, *supra*, at 247, contained in Dorschner, *A Question of Innocence*, Miami Herald, July 28, 1985 (Tropic Magazine), at 11, Col. 2.

Respondent vehemently submits that the rights of the defendant to confront his accusers during a critical part of the trial takes precedence over any interest the state may have in prosecuting these cases. The defendant ought *never* to be excluded from the competency hearing. But even if this Court is of the opinion that, under certain circumstances, the defendant can be excluded from the hearing, a strong showing must first be made by the state *before* such a procedure can be invoked. In *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 606-607 (1982), this Court held, in a child sex abuse case, that before the press could be excluded from the trial, "it must be shown that the denial [of the press to attend the trial] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." This Court should, at the very least, similarly hold that before the defendant can be excluded from the competency hearing, the state must show that the denial of the right of confrontation "is necessitated by a compelling governmental interest." In *Globe Newspaper*, this Court held that the burden was on the state and that the justification must be "a weighty one." *Id.*, at 606. The same principle, it is submitted, must hold true where the state seeks to exclude the defendant from the competency hearing.

In *Hochheiser* v. *Superior Court*, 161 Cal.App.3rd 777, 208 Cal.Rptr. 273 (Cal.App. 2 Dist. 1984), the Court, citing *Globe Newspaper*, enjoined the trial court from using closed circuit television to take the testimony of the prosecuting witnesses in

a child sex abuse case. The appellate court stated that the burden was on the state to show that such a procedure was necessary and that an insufficient showing was made by the state. In the case at bar, there was no showing made nor any evidence presented to the trial court that respondent's presence would have a negative or inhibiting effect on the children. The trial court made no such finding prior to its decision to exclude respondent.

If this Court holds that the defendant can ever be excluded from the competency hearing, it is urged that a heavy burden be placed on the state to show that such a procedure is necessary prior to it being invoked. The interests of fairness and equity, however, dictate that such a procedure ought not to be permitted by this Court under any circumstances.

Respondent will not concede that respecting the Sixth Amendment and due process rights of accused persons will result in an inability on the part of the states to prosecute child sex abuse cases. There is no evidence that allowing the defendant to see and confront his accusers and to participate in the process of evaluating the competency of a witness results in the guilty going free.

One of the most disturbing aspects of the Commonwealth's position in this matter is its unspoken, but apparent, belief that the prosecuting witnesses in these type of cases are invariably telling the truth and that the defendants are invariably guilty. This premise is necessarily implicit in the Commonwealth's argument. Their position, quite simply, is that the defendant in a sex abuse case is guilty and that the end (securing a conviction) justifies the means (violating the constitutional rights of confrontation and due process). It is appropriate to remind the Commonwealth and its supporting amici that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Taylor* v. *Kentucky*, 436 U.S. 478, 483 (1978) quoting *Coffin* v. *United States*, 156 U.S. 432, 453 (1895).

The damage that can be wrought an innocent person by an incompetent child or by one who has been so manipulated as to

not know the difference between truth and falsity can be devastating and can last a lifetime. This Court should not legitimize and legalize the efforts of the Commonwealth of Kentucky, and other states, to cripple, if not totally eradicate, the *necessary* constitutional safeguards accorded an accused person in this country. A recent editorial from a Kentucky newspaper regarding this very case put the issue in proper perspective:

> The Sixth Amendment was added to the Constitution to provide Americans with some protection against false accusations and malicious prosecution. It was a wise addition that is now an integral part of the American system of justice. If an accuser, even an accuser who is a child, is protected from confronting the accused, the judicial system can be used to generate no end of mischief for an individual for no other reason than that someone else dislikes him.[39]

Respondent is not asking for any unfair advantage in this case. He is not asking to be set free on any technicality or because "the constable blundered." He is merely asking that he be permitted to be present during a most critical phase of his trial. This Court should hold, as a matter of federal constitutional law, that respondent could not be excluded during the competency hearing.

II.

THE KENTUCKY SUPREME COURT DID NOT ERR IN FAILING TO APPLY THE HARMLESS ERROR TEST IN THIS CASE.

This Court should hold that refusing to permit the defendant to attend the competency hearing is not subject to a harmless error analysis. Even if a harmless error test is employed, the error in this case could not have been harmless beyond a reasonable doubt.

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[39] Editorial, *6th Amendment Outweighs Desire to Protect Children*, Lexington Herald-Leader, Vol. 5, No. 22, January 24, 1987, at A6, col. 1.

A. A Harmless Error Analysis Should Not Be Made In This Case

The constitutional rights which were violated by the order of the trial court excluding respondent from the competency hearing are so serious in nature that a harmless error analysis is not warranted. As respondent has argued, the trial court's exclusion of respondent from the competency hearing violated three fundamental constitutional rights: the right to confront the witnesses against him, the right to effective assistance of counsel and the right to due process of law.

In regard to confrontation, the Commonwealth relies heavily upon this Court's recent opinion, in *Delaware* v. *Van Arsdall*, 475 U.S. ____, 106 S.Ct. 1431 (1986) wherein this Court held that the trial court's failure to permit the defense to question a prosecution witness about the dismissal of charges was error, but the error was subject to a harmless error analysis. This Court rejected Van Arsdall's contention that *Davis* v. *Alaska*, 415 U.S. 308 (1974) requires "an automatic reversal rule" whenever the defense is prohibited from showing bias on the part of a prosecution witness. But the Commonwealth's reliance on *Van Arsdall* is misplaced. *Van Arsdall* concerned the failure of the court to permit impeachment of a prosecution witness. There is no doubt that, under *Van Arsdall*, such an error is now subject to harmless error analysis. But the error in the instant case is different. The error in this case involves the total failure of the court to permit the defendant to be present at a hearing. *Van Arsdall* concerned an evidentiary matter, not the total exclusion of the defendant. In a case like *Van Arsdall*, it is possible for a reviewing court to look at all of the evidence and decide what effect, if any, particular questions or evidence would have had on the overall case against a defendant. That is not the situation in the case at bar. Here, there is no way for any reviewing court to know what effect the presence of the accused would have had on the competency evaluation. As respondent argued previously, the "reliability" factor, an inherent and critical part of the right to confrontation, was nullified by the exclusion of the defendant from the hearing. In light of this problem, there is no way for a reviewing court to properly apply a harmless error analysis.

The failure to permit the defendant to be present at the competency hearing amounts to a "core" confrontation violation. It is significantly different from the type of violation which occurred in *Delaware* v. *Van Arsdall*, *supra*. Where the error concerns the failure of the defense to be permitted to cross-examine a government witness on a specific subject, such an error can be isolated and can be viewed in the context of the overall evidence. But where the defendant is physically unable to attend an important part of the proceedings, there is no effective way to gauge the effect. As was noted in *Rushen* v. *Spain*, 464 U.S. 114, 129, n.8 (1983) (per curiam) (STEVENS, J., concurring):

> If a defendant were denied access to the courtroom while the prosecutor was examining his accusers, the constitutional error would taint the verdict no matter how firmly we might be convinced that the defendant's absence did not affect the outcome of the trial.

The concurrence continued by quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 116 (1934):

> [C]onstitutional privileges or immunities may be conferred so explicitly as to leave no room for an inquiry whether prejudice to a defendant has been wrought through their denial.

Id. Finally, while stating that the *general* right to presence "may be inherently susceptible to a harmless error analysis," the concurring opinion cautions that "a core Confrontation Clause violation might not be deemed harmless error . . ." *Id.*

In *Delaware* v. *Van Arsdall*, *supra*, this Court reiterated that "some constitutional errors . . . are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case." 106 S.Ct., at 1437. The failure to allow the defendant to be present at the competency hearing is a similar type of constitutional error.

The Commonwealth correctly asserts that this Court has applied the doctrine of harmless error to certain Sixth Amendment violations. In *Harrington* v. *California*, 395 U.S. 250 (1969), this Court applied the harmless error test to the admission into evidence of the confession of a non-testifying co-

defendant. In *Coleman* v. *Alabama*, 399 U.S. 1 (1970), this Court employed a harmless error analysis to a deprivation of the right to counsel at a pre-trial proceeding. In *Rushen* v. *Spain*, *supra*, this Court applied the harmless error test to an unrecorded ex parte communication between a trial judge and a juror. *Rushen* involved the right to be present at all stages of the proceedings and this Court held that that right was subject to a harmless error analysis "unless the deprivation, by its very nature, cannot be harmless." *Id.*, at 117, n.2. The instant case presents a situation where the violation of the constitutional right to confrontation cannot be harmless error. The cases cited above were unlike the instant case which clearly involves a "core Confrontation Clause" violation. As was pointed out in *Rushen*, at 128, n.7 (STEVENS, J., concurring), "The Court has permitted harmless error analysis . . . when the violation of the Sixth Amendment consists of the admission of evidence, since it is ordinarily possible to ascertain whether consideration of inadmissible evidence is harmless error" [Citations omitted].

In addition to the confrontation violation, respondent was also deprived of due process in that he was deprived of the opportunity to be present at a proceeding where his presence had "a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105-106 (1934). Petitioner has cited no cases which would allow a harmless error test to be employed where the defendant is excluded from a proceeding where his presence has a reasonably substantial relationship to the opportunity to defend against the charges. In *Snyder*, the Court held that a jury view was not the type of proceeding which bore a substantial relationship to the opportunity to defend. It is quite obvious that a jury view is different from the competency hearing in the case at bar. *Rushen* v. *Spain*, *supra*, likewise did not involve any of the witnesses against the accused; rather, it involved a juror's ex parte communication with the judge. In the instant case, however, the proceeding directly concerned whether the primary witnesses in the case could testify against the respondent. He could have assisted directly in the questioning of these witnesses since he was

acquainted with their families and may have had direct personal knowledge of facts relevant to the inquiry.

Respondent urges this Court to hold that a harmless error analysis cannot be utilized in a case such as this one where the presence of the defendant bears a substantial relationship to the opportunity to defend. Those cases which do permit a harmless error analysis where the defendant is absent during a portion of the trial invariably involve situations where the accused could not have contributed measurably to his defense.[40] Respondent's presence could certainly have made a difference in this case and it is, therefore, inappropriate to employ a harmless error test.

There is also authority for the proposition that a violation of the right to effective assistance of counsel cannot be harmless error. *Rushen* v. *Spain*, *supra*, at 128 (STEVENS, J., concurring); *Holloway* v. *Arkansas*, 435 U.S. 475 (1978); *Glasser* v. *United States*, 315 U.S. 60 (1942). While the instant case does not involve a total denial of counsel at the hearing, the exclusion of respondent severely crippled counsel and limited his effectiveness. Respondent urges this Court to hold that such an error is not subject to harmless error analysis.

B. Even If A Harmless Error Analysis Is Made, The Error In This Case Could Not Have Been Harmless Beyond A Reasonable Doubt

Even if this Court chooses to employ a harmless analysis in this case, it is submitted that the error of excluding respondent from the hearing could not have been harmless beyond a rea-

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[40] See, e.g., *Nevells* v. *Parratt*, 596 F.2d 344, 346 (8th Cir. 1979) (absence of defendant during an in camera hearing regarding possible juror misconduct was harmless error); *United States* v. *Walsh*, 700 F.2d 846, 858 (2nd Cir. 1983), *cert. denied*, 464 U.S. 825 (1983) (exclusion of defendant from a hearing regarding exculpatory evidence was harmless error); *United States* v. *Kupau*, 781 F.2d 740, 744 (9th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3232 (U.S. Oct. 6, 1986) (No. 85-2032) (absence of defendant during communications between jury and the court "would not have affected the outcome . . ."

sonable doubt. In order for a federal constitutional violation to be held harmless, it must be determined that it was harmless *beyond a reasonable doubt*. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Such a showing can certainly not be made in this case.

There was strong doubt in this case whether any of the three minor witnesses were competent to testify. At the competency hearing, eight year old P.N.G. was never able to tell the court what it meant to tell a lie. Her only answer, which she kept repeating, was that it meant "don't tell stories" (J.A. 4-5). Seven year old P.N.G. was extremely marginal as to competency. When first asked whether she knew the difference between telling the truth and telling a lie, she nodded negatively (J.A. 7-8). The judge even acknowledged that he was unsure whether she was competent (J.A. 8). The problems with five year E.T. were even more obvious and glaring.

In addition to the fact that the hearing revealed strong doubts as to competency, the later cross-examination underscored these problems and strongly militates against any finding of harmless error by this Court. All of the witnesses exhibited great difficulty as to competency. Defense counsel was, in effect, denied the opportunity to effectively cross-examine T.M.G. or P.N.G. The cross-examination of both of them had to be terminated at crucial points because they were upset and were refusing to answer any more questions. It is furthermore difficult to believe that five (5) year-old E.T. even approached competency based on his testimony at both the hearing and in front of the jury.

It is obvious that defense counsel was totally and thoroughly frustrated in his efforts to cross-examine the witnesses in this case. Undoubtedly, if the witnesses had been older, the court would have directed them to answer the questions. But because of their ages, defense counsel was placed in the unenviable and unfair position of having to try to compel them to testify.

The reasons advanced by the Commonwealth in support of its argument that any error in this case was harmless are not

persuasive. The Commonwealth's first point, that respondent's "interest in attending the hearing was minimal" (Brief for Petitioner, 33), has already been answered. Respondent could certainly have contributed to his own defense and assisted his attorney in acting as his advocate at the hearing. In addition, respondent's presence would have contributed to the reliability of the court's determination as to competency. The Commonwealth's second point—that respondent's "interest in the competency hearing is substantially outweighed by the interest of the state in protecting its child witnesses . . ." (Brief for Petitioner, 34)—is also not supportable. There is absolutely no conclusion or consensus within the medical or psychological community that the presence of the accused necessarily intimidates or deters a child witness from testifying. Quite to the contrary, there is scientific evidence that the presence of the accused can have a cathartic influence on the witness and can assist in providing truthful testimony.

The Commonwealth stresses that respondent "was not restricted in his cross-examination of the child witnesses before the trier of fact." (Brief for Petitioner, 34). Of course, nothing could be further from the truth. Respondent was totally frustrated in his attempt to cross-examine. Respondent is well aware that in *Delaware* v. *Fensterer*, 474 U.S. ____, 106 S.Ct. 292, 295 (1985) (per curiam), this Court stated that it is the "*opportunity* for effective cross-examination" which is all that is required under the confrontation clause. But it must be emphasized that, in this case, respondent was denied the opportunity for effective cross-examination because the children themselves were unable to undergo cross-examination and it had to be terminated.

Even if this Court chooses to employ a harmless error analysis, the error in this case could simply not have been harmless beyond a reasonable doubt. There was no physical evidence of any kind that the girls had been sexually abused. The jury had to rely only on their word. Consequently, their competency was the most critical factor in this case. The testimony of the witnesses was conflicting and questionable in many respects. P.N.G. even admitted that she never saw respondent expose

himself; rather, this information was conveyed to her by another (J.A. 50-51). The evidence against respondent was certainly not overwhelming. The possibility that the children may have been fabricating this entire episode, pursuant to the influence of their mother or Bonita Griffin, is certainly plausible.

The five factors listed by this Court in *Delaware* v. *Van Arsdall*, *supra*, 106 S.Ct., at 1438, as relating to harmless error in confrontation clause cases, have more than been met by respondent in this case. The competency of these witnesses, based upon the totality of the record, is certainly open to question. Therefore, the error of excluding respondent from the competency hearing cannot be held harmless beyond a reasonable doubt.

III.

THE OPINION OF THE KENTUCKY SUPREME COURT RESTS ON ADEQUATE INDEPENDENT STATE GROUNDS

The Commonwealth asserts that it is not clear from the opinion of the Kentucky Supreme Court that its decision was based on Section 11[41] of the Kentucky Constitution. Respondent strenuously disagrees.

The opinion of the Kentucky Supreme Court reads, in pertinent part, as follows:

> In addition to the right of confrontation provided by the Sixth Amendment to the United States Constitution, the Eleventh Section of the Bill of Rights of the Kentucky Constitution guarantees the accused in a criminal prosecution the right to be heard by himself and counsel and to meet the witnesses (against him) face to face.

(J.A. 82). The opinion certainly does not say, or in any way intimate, that the Court felt its interpretation of Section 11 was

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[41] Section 11 of the Kentucky Constitution reads, in pertinent part, as follows:

> In all criminal prosecutions the accused has the right to . . . meet the witnesses face to face.

compelled by its interpretation of the Sixth Amendment. The opinion never states that the "face to face" requirement is contained in both the federal and state constitutions. The opinion, rather, says "in addition to." That language makes it clear that the right to confrontation under the Kentucky Constitution is separate from the right under the Sixth Amendment. This concept of separateness is given further support by the language of the opinion which describes the Kentucky constitutional right of confrontation as encompassing a "face to face" confrontation. The Court did not say that the Sixth Amendment has this requirement because, plainly, it does not contain such language. The Kentucky Constitution, on the other hand, contains this specific "face to face" language. It is very clear that the Kentucky Supreme Court was cognizant of this distinction and was separating the two constitutional provisions. The opinion further states that "[a]ppellant clearly asserted and was denied his constitutional right to meet the witnesses face to face" (J.A. 83).

The Commonwealth relies heavily on this Court's recent opinion in *Michigan* v. *Long*, 463 U.S. 1032 (1983). Respondent is well aware of the importance of that case and the fact that it represented a shift from prior cases of this Court concerning independent state grounds in state court judgments.[42] Respondent strenuously submits that the opinion of the Ken-

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[42] The standard enunciated by this Court in *Michigan* v. *Long* is as follows:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independency of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court reached.

Id., 463 U.S. at 1040-1041.

tucky Supreme Court "make[s] clear by a plain statement" that its decision rests on Kentucky law. The opinion distinguishes the Kentucky right of "face to face" confrontation from the Sixth Amendment right. It specifically states that it was the "face to face" constitutional right which was violated. The opinion, furthermore, does not cite a single federal case. Therefore, the requirement that it state that "federal cases are being used only for the purpose of guidance" is inapplicable. The fact that no federal cases are cited is strong evidence that this case was decided on state constitutional grounds. The only case cited by the Court in support of its holding is *Powell* v. *Commonwealth*, 346 S.W.2d 731 (Ky. 1961).

Even under the standard expressed in *Michigan* v. *Long*, *supra*, it is clear that this case rests on adequate independent state grounds and that jurisdiction should not be exercised by this Court. The Commonwealth quotes from the recent opinion of the Kentucky Supreme Court in *Commonwealth* v. *Willis*, 716 S.W.2d 224, 227, 229 (Ky. 1986) as support for its position that the Kentucky Supreme Court equates Section 11 of the Kentucky Constitution with the Sixth Amendment and that the Kentucky Constitution is not to be construed "more stringently" than the Sixth Amendment. The response to this argument is twofold. First of all, in *Michigan* v. *Long*, *supra*, this Court clearly expressed its disapproval of the concept of looking at other state cases in order to determine what a state appellate court meant in a different decision. *Id.*, 463 U.S., at 1039, 1041. This Court held that jurisdiction would be presumed where, "it is not clear *from the opinion itself* that the state court relied upon an adequate and independent state ground . . ." *Id.*, at 1042 (emphasis added). Because the *Stincer* opinion makes it clear that the "face to face" requirement of Section 11 was being relied upon, in addition to the Sixth Amendment, this Court has no need to resort to other Kentucky cases.

Secondly, even if *Willis* is considered, a close examination reveals that the Commonwealth's position is not well taken. *Willis* was decided by a 4-3 vote in the Kentucky Supreme Court. The majority opinion was written by Justice Wintersheimer. Three other justices concurred, but a separate concurring opinion was written by one of those justices, Justice Leibson. The remaining two concurring justices specifically joined in the concurring opinion of Justice Leibson. The excerpt quoted by the Commonwealth (Brief for Petitioner, 31) is contained in the opinion written by Justice Wintersheimer. It is evident that the concurring justices concurred only in the result[43] and not in the entire holding. The three concurring justices are much less vigorous in their support of the videotape statute than was Justice Wintersheimer. There is absolutely no language in the concurring opinion indicating any support for the idea that Section 11 of the Kentucky Constitution is *not* to be construed more strictly then the Sixth Amendment. There is no language in the concurrence indicating that the state and federal confrontation clauses are to be construed in the same manner. They are mentioned separately in every instance. The dissenting opinion, written by Chief Justice Stephens and joined by two other justices, specifically speaks of the fact that the Kentucky Constitution contains a "more definitive" confrontation right than does the Sixth Amendment. *Id.*, at 234. Thus, it is clear that the language the Commonwealth is relying upon, in support of its proposition that Section 11 is to be construed the same as the Sixth Amendment, is the opinion of only one justice of the Kentucky Supreme Court.

The Commonwealth also argues that Kentucky has a "longstanding practice of interpreting confrontation issues based upon federal case law." (Brief for Petitioner, 30). That is not true. The Commonwealth cites *Scott* v. *Commonwealth*, 616 S.W.2d 39 (Ky. 1981), but that reliance is misplaced. That case concerned a defendant who refused to come to court. The Kentucky Supreme Court ruled that he had waived his right by not attending. *Scott* was a waiver case and that is why *Illinois* v. *Allen*, 397 U.S. 337 (1970) was cited. The "face to face"

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[43] Rule 1.020(1)(a) of the Kentucky Supreme Court states that "[t]he final disposition of all appeals . . . in the Supreme Court . . . shall be decided by a concurrence of at least four of its members . . ."

aspect of the Kentucky Constitution was not the real issue. The case does not stand for the principle which the Commonwealth maintains. Respondent also disagrees with the Commonwealth's position that, historically, Kentucky bases its interpretation of confrontation issues on federal case law. An examination of the relevant case law in Kentucky actually reveals just the opposite.[44]

Respondent strenuously submits that the opinion of the Kentucky Supreme Court plainly indicates that Section 11 of the Kentucky Constitution serves as "separate, adequate, and independent grounds" for this decision. *Michigan* v. *Long*, *supra*, 463 U.S., at 1041. This Court should therefore vacate its grant of certiorari and affirm the opinion of the Kentucky Supreme Court.

CONCLUSION

Respondent respectfully requests that the decision of the Kentucky Supreme Court be affirmed.

Respectfully submitted,

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[44] In *Harris* v. *Commonwealth*, 315 S.W.2d 630, 632 (Ky. 1958), the Kentucky Court of Appeals specifically discussed the fact that the Sixth Amendment "grants the right to the accused 'to be confronted with the witnesses against him' and the state constitution guarantees to him the privilege to 'meet the witnesses face to face.'" This same quote was used later in *Flatt* v. *Commonwealth*, 468 S.W.2d 793, 794 (Ky. 1971). In *Hill* v. *Commonwealth*, 474 S.W.2d 95, 99 (Ky. 1971), the Court held that the petitioner had been deprived of his right to be present at a "court of inquiry." The Court spoke of the right to meet witnesses "face to face." Only Section 11 of the Kentucky Constitution was discussed. The Sixth Amendment was not mentioned at all. In *Fleming* v. *Commonwealth*, 280 S.W.2d 148, 149 (Ky. 1955), only Section 11 was relied upon. Again, the Sixth Amendment was not mentioned in spite of the fact that the judgment was reversed because of the absence of the defendant from the trial.

REPLY BRIEF

Supreme Court, U.S.
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No. 86-572

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

COMMONWEALTH OF KENTUCKY - - Petitioner

versus

SERGIO STINCER - - - - - Respondent

On Writ of Certiorari to the Supreme Court of Kentucky

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... ii–iii

ARGUMENT 1–17

I. The Supreme Court of Kentucky Erred by Extending the Confrontation Clause to Guarantee a Defendant an Absolute Right to be Present at a Child Victim Competency Hearing. 1–16

A. Extension Of The Confrontation Right Of Presence Is Not Supported By Case Law Nor By The Claims Of Respondent 2–11

B. The Result Reached By The Supreme Court Of Kentucky Cannot Be Supported On The Ground Of A Denial Of Due Process. 11–12

C. This Is Not Such An Exceptional Case That This Court Should Consider Respondent's Unmeritorious Claim That The Right To Presence Is Rooted In The Sixth Amendment Right To Counsel. 12–15

D. Jurisdiction. 15–16

II. Assuming A Violation Of The Confrontation Clause, The Kentucky Supreme Court Erred By Its Failure To Consider Whether The Violation Was Harmless. 16–17

CONCLUSION 17

TABLE OF AUTHORITIES

Cases: PAGE

Barber v. *Page*, 390 U.S. 719 (1968) 3
Capps v. *Commonwealth*, 560 S. W. 2d 559 (Ky. 1977) 5, 16
Cardinale v. *Louisiana*, 394 U.S. 437 (1969) 13
Commonwealth v. *Willis*, 716 S. W. 2d 224 (Ky. 1986) 4, 10, 15
Delaware v. *Fensterer*, 474 U.S. ____, 106 S. Ct. 292 (1985) 17
Delaware v. *VanArsdall*, 475 U.S. ____, 106 S. Ct. 1431 (1986) 5
Globe Newspaper Co. v. *Superior Court*, 457 U.S. 596 (1982) 2
Hardy v. *Commonwealth*, 719 S. W. 2d 727 (Ky. 1986) 4
Illinois v. *Gates*, 462 U.S. 213 (1983) 13
Mancusi v. *Stubbs*, 408 U.S. 204 (1972) 3
McCray v. *Illinois*, 386 U.S. 300 (1967) 3
McGoldrick v. *Compagnie Generale Transatlantique*, 309 U.S. 430 (1940) 13
Michigan v. *Long*, 463 U.S. 1032 (1983) 15, 16
Moore v. *Illinois*, 434 U.S. 220 (1977) 14
Ohio v. *Roberts*, 448 U.S. 56 (1980) 3
Pennsylvania v. *Ritchie*, No. 85-1347, (decided February 24, 1987) 2, 4, 5, 11, 14
Powell v. *Commonwealth*, 346 S. W. 2d 731 (Ky. 1961) 16
Snyder v. *Massachusetts*, 291 U.S. 97 (1934) 2, 8
Stincer v. *Commonwealth*, 712 S. W. 2d 939 (Ky. 1986) 4, 11, 15, 16
Strickland v. *Washington*, 466 U.S. 668 (1984) 14
United States v. *Ash*, 413 U.S. 300 (1973) 14
United States v. *Byers*, 740 F. 2d 1104 (D.C. Cir. 1984) 14

PAGE

United States v. *Gagnon*, 470 U.S. 522 (1985) 3
Watkins v. *Sowders*, 449 U.S. 341 (1981) 6, 7, 8
Wheeler v. *United States*, 159 U.S. 523 (1895) 5, 16

Other Authorities:

American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged* (Washington. D.C.: 1985) 8, 9, 11
America's Missing and Exploited Children: Their Safety and Their Future, Report and Recommendations to the President and Congress, U.S. Department of Justice (Washington, D.C.: March 1986) 9
Carrington and Nicholson, The Victims' Movement: An Idea Whose Time Has Come, 11 *Pepperdine Law Review*, Symposium (1984) 8
Comment: "The Young Victim As Witness For The Prosecution: Another Form Of Abuse?" 89 *Dickinson Law Review*, 721 (1985) 10
Four Years Later, A Report On The President's Task Force On Victims Of Crime, U.S. Department of Justice (Washington, D.C.: May, 1986) 9
Metropolitan Court Judges' Committee Report, *Deprived Children: A Judicial Response, 73 Recommendations* (Reno, Nevada: August 1986) .. 9
President's Task Force on Victims of Crime, Final Report (Washington, D.C.: Dec. 1982) 8
Statement of Recommended Judicial Practices, The National Institute of Justice (Washington, D.C.: 1983) 10
Whitcomb, *When The Victim Is A Child*, U.S. Department of Justice (Washington, D.C.: August 1985) 7, 9, 10

No. 86-572

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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v.

SERGIO STINCER - - - - - *Respondent*

On Writ of Certiorari to the Supreme Court of Kentucky

PETITIONER'S REPLY BRIEF

ARGUMENT

I. THE SUPREME COURT OF KENTUCKY ERRED BY EXTENDING THE CONFRONTATION CLAUSE TO GUARANTEE A DEFENDANT AN ABSOLUTE RIGHT TO BE PRESENT AT A CHILD VICTIM COMPETENCY HEARING.

Respondent states that his "exclusion from the competency hearing violate[d] his rights of confrontation and effective assistance of counsel . . ."[1] He assumes a right to be present and claims Kentucky fails to demonstrate sufficient compelling interests to support his "exclusion." Kentucky submits the issue is not whether Stincer was improperly excluded, but, rather, whether the right of confrontation should have been *extended* to include an absolute right to be pres-

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[1]Brief for Respondent Stincer (hereafter "Respondent") Question I.

ent at a competency hearing.[2] No compelling reason for this Court to sanction such an expansion of the Confrontation Clause has been advanced; instead, respondent "shotguns" the issue with a variety of previously unasserted assumptions, facts, and claims.

A. Extension of the Confrontation Right of Presence Is Not Supported by Case Law Nor by the Claims of Respondent.

1. Confrontation Is a Trial Right and Was Satisfied in This Case.

Just this year, a plurality of this Court reiterated:

> The opinions of this Court show that the right of confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination.

Pennsylvania v. *Ritchie,* No. 85-1347, Slip Op., at 11 (decided February 24, 1987) (Emphasis in original). The scope and purpose of the Confrontation Clause, and the right of presence rooted therein, have been made clear in a line of cases extending over half a century.

A jury view of the crime scene is not a stage of trial where a defendant has either a Confrontation Clause or a Due Process right to be present. *Snyder* v. *Massachusetts,* 291 U.S. 97 (1934). There is no confrontation nor due process right to discover an in-

[2]Respondent's confusion is highlighted by his citation on this point to *Globe Newspaper Co.* v. *Superior Court,* 457 U. S. 596 (1982) (Brief for Respondent, p. 37). Not only did *Globe* arise under the First Amendment—not the Sixth—but the case turned on government *exclusion* of the press from a child sex abuse trial.

former's identity in a suppression hearing concerning only the preliminary issue of probable cause "and guilt or innocence is not at stake." *McCray* v. *Illinois,* 386 U.S. 300, 311-312 (1967). "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Barber* v. *Page,* 390 U.S. 719, 725 (1968). See also *Mancusi* v. *Stubbs,* 408 U.S. 204, 211 (1972); *Ohio* v. *Roberts,* 448 U.S. 56, 63-64 (1980). The right of presence is rooted in the Confrontation Clause but "is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." *United States* v. *Gagnon,* 470 U.S. 522, 526 (1985). However, there was no denial of due process when a defendant was not present, but was represented by counsel, at an *in-camera* discussion between the judge and juror.

This Court's precedents, and others cited in Kentucky's brief on the merits, refute respondent's assertion that full adversarial rights should attach to an *in-camera* competency hearing where guilt or innocence is not at stake, where the information obtained from the children is not accusatorial in nature, and where the jury is not assessing the demeanor of a witness. The Confrontation Clause right of presence attached in the present case when the children took the stand before the jury and made accusations against Stincer. At that point, it was also fully satisfied. Stincer and counsel were present and were afforded a

full and fair opportunity by the trial court to cross-examine the witnesses. The jury could observe the demeanor of the witnesses and judge whether their testimony was worthy of belief. This is plainly one of the many cases in which "simple questioning of a witness will satisfy the purposes of cross-examination." *Pennsylvania* v. *Ritchie, supra,* Slip Op. at 2 (Blackmun, J., concurring). No further protection is warranted.

2. Respondent Exalts Semantics Over the Substantive Purposes of the Right of Presence.

Respondent and supporting amici seem determined to remake the facts of this case through selective labeling. The fact that an *in camera* voir dire takes place after the jury has been sworn does not make a competency hearing a "trial" for purposes of the Confrontation Clause or for Due Process.[3] Of the three competency hearings in this case, only one, that of E.T., was actually "mid-trial" in the sense that the jury had already heard evidence. The competency hearing of E.T., however, is not before this Court since respondent was either present or did not object. A

[3]Brief for Respondent, at 14. The proceeding is normally a pre-trial one. In *Commonwealth* v. *Willis,* 716 S. W. 2d 224, 226 (Ky. 1986), and *Hardy* v. *Commonwealth,* 719 S. W. 2d 727, 728 (Ky. 1986), for example, the competency hearing took place before the trial date. This case was briefed below by respondent as involving a "pre-trial" proceeding (Brief for Appellant before the Supreme Court of Kentucky, at 14), and the Kentucky Supreme Court characterized it as a "pre-trial hearing" in its opinion. *Stincer* v. *Commonwealth,* 712 S. W. 2d 939, 940 (Ky. 1986) (J.A. 81).

competency hearing does not take on the aspects of a trial merely because the jury has been sworn, nor is it an adversarial proceeding. No evidence is being presented to the jury, nor is the judge considering factual accusations.[4] Finally, the issue of guilt or innocence of the defendant is irrelevant to the question to be resolved by the trial court in a competency hearing.[5]

As Stincer recognizes, "at a competency hearing, the narrow issue is not whether the child is telling the truth, but rather whether the child understands the difference between truth and falsity" (Brief for Respondent, at 27, n. 23). By arguing that this is a "distinction without a difference" (*Id.*), however, respondent reiterates a persistent theme. This theme is the failure to distinguish between "competency" and "honesty." Departing from an extremely narrow judicial enquiry into the witnesses' competency, illustrated by *Wheeler* v. *United States,* 159 U.S. 523 (1895), and *Capps* v. *Commonwealth,* 560 S. W. 2d 559, 560 (Ky. 1977), respondent and amici envision the competency hearing as a kind of "mini-trial" at which both the witnesses' competency *and honesty* are at stake.

[4]"The right of a defendant to confront an accuser is intended fundamentally to provide an opportunity to subject *accusations* to critical scrutiny." *Pennsylvania* v. *Ritchie, supra,* Slip Op. at 6, (Brennan, J., dissenting) (emphasis in original).

[5]See *Delaware* v. *VanArsdall,* 475 U. S. ____, 106 S. Ct. 1431, 1436 (1986) (central purpose of trial is to decide the factual question of the defendant's guilt or innocence).

In Kentucky, a determination of competency, usually involving the affirmation that the child will tell the truth, is a substitute for the formal oath. Respondent and his amici, however, ask this Court to sanction a competency hearing which is adversarial; at which counsel and/or the defendant has an absolute right to interrogate the potential child witness,[6] at which the defendant may present, through personal testimony or through counsel, specific instances of alleged "lying" by the child witness;[7] and where additional witnesses or "experts" will testify as to whether the child has been coached by others.[8] Stincer's claims

[6]Respondent states that his purpose at the hearing was "the purpose of cross-examination." (Respondent's Brief, at 19, 26). Respondent boldly asserts that because he was not at the hearing, "his fundamental and critical right to cross-examine" the children at the hearing was impaired (Brief for Respondent, at 17). This claim was not presented to, nor ruled on, by the court below.

[7]Even if the defendant could present specific instances of lying which could be corroborated and which in fact took place, this would only be relevant to the witnesses' *credibility*, not her competency. Second, there is the danger that the defendant will fabricate incidents to harass the child, make her confused and upset, and, of course, to weaken her *credibility*. Naturally the defendant would prefer to make this "preemptive strike" at the competency hearing.

[8]Amicus National Association of Criminal Defense Lawyers, at 14. This amicus assumes the facts of the crime are discussed during the in-camera voir dire. But in the hearings challenged here, no facts were discussed. Alternatively, amicus is urging this Court to grant a right to discover, through in-camera examination of potential witnesses, whether forthcoming trial testimony may have been influenced by external events or persons. A similar claim was raised and rejected in *Watkins* v. *Sowders*, 449 U. S. 341

(Footnote Continued on Next Page)

are without authoritative support and greatly complicate a competency requirement.[9] As in *Watkins* v. *Sowders*, 449 U. S. 341, 348 (1981), respondent points to no legitimate instance in the trial court when his counsel was deterred from effective cross-examination by respondent's absence from the competency hearing.

3. Respondent's Claims Do Not Support Extension of the Confrontation Clause.

Stincer's claim that the right of confrontation should be extended because a defendant may know whether a child is telling the truth in a competency hearing has been refuted above as relating to credibility, not competency. The further claim that a defendant is entitled to extra protection in child sexual abuse cases because the charges are difficult to defend,

(Footnote Continued From Preceding Page)

(1981). This Court expressly declined to hold that the process "requires the abandonment of the time-honored process of cross-examination [before the jury] as the device best suited to determine the trustworthiness of testimonial evidence" (*Id.* at 349).

[9]"For adults, the taking of the oath is considered adequate evidence that the witness knows the difference between truth and falsehood and is obligated to tell the truth." Whitcomb, *When the Victim is a Child: Issues for Judges and Prosecutors* (National Institute of Justice, 1985), at 34. Would a defendant be allowed to challenge an adult's competency at a preliminary hearing by alleging that the adult had lied in the past, or had been coached to give certain testimony? Why should such challenges be allowed against children? Again, these are credibility issues, and it is worth remembering that the purpose of the competency hearing is not to establish the veracity of the child. "In children as well as adults, comprehending the oath and the repercussions of telling a lie does not guarantee honesty" (*Id.*).

is meritless. If anyone is entitled to additional protection in competency hearings, it is the victim.

Stincer tries to denigrate the widely recognized need in the criminal justice system to accord fair treatment and "justice" to victims as well as defendants. In *Snyder* v. *Massachusetts,* 291 U.S. 97, 122 (1934), Justice Cardozo cautioned:

> But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

In 1982, the Chairman of the President's Task Force on Victims of Crime described the neglect of crime victims as a "national disgrace."[10] The need for reform in the handling of child victims/witnesses has been recognized by the American Bar Association,[11] the National Conference of the Judiciary on The Rights of Victims of Crime,[12] the more than 2000 members of the National Council of Juvenile and Family Court Judges,[13] and the United States Attorney General's Advisory Board.[14] The need for special treatment of child sex abuse victims is highlighted by studies concluding that 10 percent of males and 25 percent of females have been sexually abused as children and that only about six percent of the perpetrators are strangers.[15] The President's Task Force subsequently recommended: "Judges should recognize the profound impact that sexual molestation of children has on victims and their families. . . ."[16]

Among child sex victims, "the most frequently mentioned fear was facing the defendant."[17] "Whether the courtroom experience is traumatic or therapeutic depends in large measure on the attitude of the court itself toward modifying the proceedings as necessary to accommodate the needs of child victims and witnesses."[18]

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[10]*President's Task Force on Victims of Crime, Final Report* (Washington, D.C.: December 1982) at vii (statement of Lois Haight Herrington). "Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest" (*Id.* at vi). See also, Carrington and Nicholson, The Victims' Movement: An Idea Whose Time Has Come, 11 *Pepperdine Law Review,* Symposium (1984).

[11]American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse Is Alleged* (Washington, D. C.: 1985).

[12]*Statement of Recommended Judicial Practices,* The National Institute of Justice (Washington, D.C.: 1983).

[13]Metropolitan Court Judges' Committee Report, *Deprived Children: A Judicial Response, 73 Recommendations* (Reno, Nevada: August 1986).

[14]*America's Missing and Exploited Children: Their Safety and Their Future,* Report and Recommendations to the President and Congress, U. S. Department of Justice (Washington, D. C.: March, 1986).

[15]Metropolitan Court Judges, *supra* n. 13, at 10.

[16]*Four Years Later, A Report on the President's Task Force on Victims of Crime,* U. S. Department of Justice, at 31 (Washington, D. C.: May, 1986).

[17]*When the Victim Is a Child,* U. S. Department of Justice, at 17, 49 (Washington, D. C.: August 1985).

[18]American Bar Association, *Guidelines, supra* n. 11, at 19.

When the accuser is a child, the right of confrontation affords a convenient means of intimidation with a serious and damaging effect on the child's ability to testify.[19] This result was clearly demonstrated in *Commonwealth* v. *Willis,* 716 S. W. 2d 224, 226 (Ky. 1986), where the child was so frightened by the defendant's presence in chambers at the pretrial hearing that competency could not be determined.[20]

Respondent and amici argue an accused should be granted a right to be present at a competency hearing unless the state can demonstrate on a case-by-case basis "specific and substantial" psychological trauma to the individual child witness.[21] Why, for purposes of a competency hearing, should a child victim be required to prove that facing a sexual molester again will be frightening or just how terrifying the experience will be? Common sense tells us the experience would be traumatic. Why should the right of confrontation be extended and the victim be required to

[19] *When The Victim, supra* n. 17, at 49. See also, Comment, "The Young Victim As Witness For The Prosecution: Another Form Of Abuse?" 89 *Dickinson Law Review* 721, 743 (1985).

[20] "When the child was asked why she would not respond to certain questions, she stated:

A. I don't want him—hurt me.

* * *

Q. Are you going to talk for us?

A. I don't want him here.

* * *

A. Yes, I don't want Uncle Leslie, Mommy."

Willis, 716 S. W. 2d at 226.

[21] Amicus American Psychological Association, at 26.

prove trauma simply because current studies show that some or many, but perhaps not all, children would be harmed or intimidated into silence? Why should a child victim be forced to face an alleged molester yet another time?[22] Respondent has not demonstrated a need under the facts of this case to extend confrontation.

B. The Result Reached by the Supreme Court of Kentucky Cannot be Supported on the Ground of a Denial of Due Process.

Respondent contends his absence from the competency hearing violated due process. While he did include the words "due process" in the heading and concluding sentence of his confrontation argument in state court, the issue was not decided by the court below.

Should this Court nonetheless decide to reach this issue, respondent's claim is without merit. Respondent tries to demonstrate "a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" by arguing that the court and counsel needed his contemporaneous input to know if the child was lying about facts such as school, teachers and church (Brief for Respondent at 26-28). Again, respondent confuses competency and honesty.

When the defendant has such knowledge, the present case is then like *Pennsylvania* v. *Ritchie, supra,*

[22] ". . . [C]hildren of sexual abuse have enough difficulty testifying in open court without the added burden of the possibility of an in-chambers intimidation factor arising from the presence of the defendant." *Stincer* v. *Commonwealth,* 712 S. W. 2d at 942 (Wintersheimer, J., dissenting) (J.A. 88).

Slip Op. at 18, where an *in-camera* review of *Brady* material does not include a due process right of disclosure to the defendant or counsel or arguments on relevance. Despite the fact the eye of an advocate would be helpful, this Court declined to allow the defense access. Moreover, the defendant here has even more protection than in *Ritchie,* for he already has the information he needs. He could disclose those facts or areas of inquiry to the court or counsel in advance of the hearing.

Finally, the defendant is present and could contemporaneously provide this same information when the witnesses take the stand at trial. The best proof respondent's presence at the competency hearing would be "useless" and "the benefit but a shadow" is the unaltered questioning on competency during the trial. If, during trial, there arises some basis for challenging the judge's competency determination, the judge may be asked to reconsider. Respondent did just that during E.T.'s testimony (TE 126-127), but raised no question concerning the other witnesses.

C. This Is Not Such an Exceptional Case That This Court Should Consider Respondent's Unmeritorious Claim That the Right to Presence Is Rooted in the Sixth Amendment Right to Counsel.

In his responsive brief Stincer raises, for the first time in any court, a claim of ineffective assistance of counsel. Respondent argues that the prevailing party is entitled to rely upon a ground in support of a judgment that was never raised or ruled on by the court

below (Brief for Respondent, at 28, n. 25). This argument lacks merit for two reasons.

First, respondent ignores this Court's teaching that it is

> the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below.

McGoldrick v. *Compagnie Generale Transatlantique,* 309 U. S. 430, 434 (1940). Respondent does not explain why this particular case should be one of those "exceptional cases" justifying such extraordinary relief except to state that this claim is an "inherent and inseparable" part of his argument—a curious assertion since respondent neglected to raise it anywhere before. All the cases cited by respondent—except *McGoldrick* which explicitly rejects his position—are cases coming from the federal courts. Other recent cases reject such state court review. *Cardinale* v. *Louisiana,* 394 U. S. 437, 438-439 (1969); *Illinois* v. *Gates,* 462 U. S. 213, 221-222 (1983).

Second, the facts do not warrant review of this claim. Counsel was provided and attended the competency hearing, the hearing was narrow in scope, defense counsel had no disagreement with the ruling of competency (J.A. 6, 11), and respondent declines to demonstrate prejudice. Respondent states:

> The competency hearing was a "critical stage" of the proceedings because a finding of incompetency

would have meant, quite likely, that respondent would not have been tried. (Brief for Respondent, at 32.)

Needless to say, this Court has never adopted such a broad outcome-determinative test for the attachment of the right to counsel. The fact that the trial court's decision was important to the continuation of the case is irrelevant. As was made clear in *United States* v. *Ash,* 413 U. S. 300, 310 (1973), the accused must find himself "confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." See, *Moore* v. *Illinois,* 434 U. S. 220, 227, n. 3 (1977); *United States* v. *Byers,* 740 F. 2d 1104, 1116-1117 (D.C. Cir. 1984). Were respondent's outcome-determinative test adopted, defendant and his counsel would be required before the Grand Jury, at the forensic lab, when an eyewitness is presented a photo lineup, at a crime scene investigation, at ballistics tests, or during witness interviews. At each of these stages decisions will be made or evidence obtained without which the charges might be dropped. Certainly the trial judge in a competency hearing is not an expert adversary. Indeed, the competency examination by the trial court is similar to a judge's *in-camera* examination for *Brady* material in state documents as authorized by this Court in *Pennsylvania* v. *Ritchie, supra,* Slip Op. at 18.

Finally, respondent's failure to demonstrate prejudice in his ineffective assistance of counsel claim ignores this Court's teaching in *Strickland* v. *Washington,* 466 U. S. 668 (1984). "Critical stage" analysis is used where counsel has been denied; here counsel was

present. It is disingenuous to argue that counsel is meaningless without the defendant's presence, therefore prejudice need not be shown. This Court has never held that the right to presence is rooted in the right to counsel.

D. Jurisdiction

Respondent recognizes that *Michigan* v. *Long,* 463 U.S. 1032, 1040-1041 (1983), provides this Court with presumptive jurisdiction whenever "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion . . . ." If the Kentucky Supreme Court felt that Section 11 of the Kentucky Constitution was more restrictive than those rights granted by the Sixth Amendment, it had only to say so plainly. This it did not do. The same Kentucky Court less than a year earlier held that the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution are "basically the same." *Commonwealth* v. *Willis,* 716 S. W. 2d 224, 227 (Ky. 1986).[23] It is this same interwoven reference to both constitutional provisions that characterizes the opinion in this case (*Stincer* v. *Commonwealth, supra* at J.A. 81, 82). The identical meshing

[23]Respondent argues that the quoted language in *Willis* reflects the view of one Justice only. That is not correct. Three Justices concurred in the opinion; these three then joined in an additional separate opinion to explore "the minimum requirements for applying this statute constitutionally." *Willis, supra* at 232 (Liebson, J., concurring).

of federal and state constitutional requirements is found in other Kentucky cases as well; for example, in *Powell* v. *Commonwealth,* 346 S. W. 2d 731, 734 (Ky. 1961), cited in *Stincer* (at J.A. 82). Respondent cannot point to any plain statement in *Stincer, supra,* that Section 11 of the Kentucky Constitution provides broader rights than provided by the Sixth Amendment. Nor has he supported his position with any other Kentucky case. Under these circumstances the jurisdiction of this Court under *Michigan* v. *Long, supra,* is both clear and compelling.

II. ASSUMING A VIOLATION OF THE CONFRONTATION CLAUSE, THE KENTUCKY SUPREME COURT ERRED BY ITS FAILURE TO CONSIDER WHETHER THE VIOLATION WAS HARMLESS.

Kentucky relies upon its brief on the merits in reply to respondent's argument regarding harmless error, with but one exception.

Respondent's assertion that there was "strong doubt in this case whether any of the three minor witnesses were competent to testify" is disingenuous and irrelevant (Brief for Respondent, at 44). First, the competency of the two principal witnesses was not challenged at trial or before the Kentucky Supreme Court. Second, any reasonable reading of the competency hearing transcript and trial testimony resolves all doubt that the witnesses were competent. *Wheeler* v. *United States,* 159 U. S. 523 (1895); *Capps* v. *Commonwealth,* 560 S. W. 2d 559 (Ky. 1977). The trial court's determination of competency is not implicated

by respondent's alleged "frustration."[24] He is not entitled to have "cross examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Fensterer,* 474 U.S. ——, 106 S. Ct. 292, 295 (1985) (per curiam).

CONCLUSION

For all the foregoing reasons, the decision of the Supreme Court of Kentucky must be reversed.

Respectfully submitted,

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[24] T.M.G.'s testimony in open court spans thirty-one (31) pages of transcript, including twenty-five (25) pages of cross-examination (J.A. 11-44; cross-examination: J.A. 17-41). P.N.G.'s testimony in open court spans fifteen (15) pages, including eleven (11) pages of cross-examination (J.A. 41-57; cross-examination: J.A. 45-57).

AMICUS CURIAE

BRIEF

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No. 86-572

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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Petitioner,

v.

SERGIO STINCER,
Respondent.

On Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

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BRIEF OF AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	7
I. ASSUMING DEFENDANTS HAVE A RIGHT TO PERSONALLY CONFRONT ADVERSE WITNESSES IN PRETRIAL HEARINGS TO DETERMINE THE COMPETENCY OF WITNESSES TO TESTIFY, IT MAY BE DISPENSED WITH WHEN NECESSARY TO PROTECT CHILD VICTIMS OF SEXUAL ABUSE FROM SUBSTANTIAL, IDENTIFIABLE TRAUMA	7
II. BECAUSE SCIENTIFIC DATA REGARDING THE EFFECTS ON CHILD VICTIMS OF SEXUAL ABUSE OF CONFRONTING THEIR ALLEGED ABUSERS IN THE COURTROOM ARE SPARSE AND INCONCLUSIVE, CASE-BY-CASE DETERMINATION OF THE EFFECTS ON INDIVIDUAL CHILDREN IS MOST APPROPRIATE	15
CONCLUSION	26

TABLE OF AUTHORITIES

CASES: Page

Berger v. California, 393 U.S. 314 (1969) 9
California v. Green, 399 U.S. 149 (1970) 3, 4, 8, 9, 11
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Capps v. Commonwealth, 560 S.W.2d 559 (Ky. 1977) 12
Chambers v. Mississippi, 410 U.S. 284 (1973) 3, 9, 10
Delaware v. Fensterer, 106 S.Ct. 292 (1985) 7
Douglas v. Alabama, 380 U.S. 415 (1965) 7, 8
Dowdell v. United States, 221 U.S. 325 11
Dutton v. Evans, 400 U.S. 74 (1970) 4, 10
Faretta v. California, 422 U.S. 806 (1975) 5, 13
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 2, 5, 11, 16, 25
Illinois v. Allen, 397 U.S. 337 (1970) 8, 10
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United States v. Benfield, 593 F.2d 815 (8th Cir. 1979) 8
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Page

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Page

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BRIEF OF AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The American Psychological Association ("APA") is a voluntary nonprofit, scientific, and professional organization with more than 60,000 members. It has been the major association of psychologists in the United States since 1892, and includes the vast majority of psychologists holding doctoral degrees from accredited universities in this country. Among APA's major functions are promoting psychological research, improving research methods, and promulgating information regarding human psychological behavior. A substantial number of APA's members are concerned with clinical and developmental psychology, including the collection of data, devel-

opment of research, and provision of therapy to child victims of sexual abuse.

The APA has participated as *amicus* in many cases in this Court involving mental health and social science issues, including *Colorado v. Connelly*, 55 U.S.L.W. 4043 (Dec. 10, 1986) (behavioral effects of command hallucinations); *Lockhart v. McCree*, 106 S. Ct. 1758 (1986) ("conviction-proneness" of "death qualified" juries); *Ford v. Wainwright*, 106 S.Ct. 2595 (1986) (competency assessments of condemned prisoners); *Ake v. Oklahoma*, 470 U.S. 68 (1985) (indigent defendants' rights to assistance from mental health professionals); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (abortion counseling by non-physicians); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (measurability of psychological harm in potential disasters). APA contributes *amicus* briefs only where it has special knowledge to share with the Court. APA regards this as one of those cases. In this instance, APA wishes to inform this Court of the state of the current social science data regarding the effects of testifying in court generally, as well as in front of the defendant, on child victims of alleged sexual abuse.

Petitioner and Respondent have consented to the filing of this *amicus* brief. Their letters of consent are on file with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the complex question of the proper accommodation of two cardinal principles—the fundamental right of criminal defendants to personally confront adverse witnesses in preliminary judicial proceedings with the State's "compelling" interest in "safeguarding the physical and psychological well-being of . . . minor[s]." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Because the right to confrontation was asserted in this case in the context of a pretrial proceeding to determine a child's competency to testify, there is an initial question whether Respondent was entitled under either the Due Process Clause of the Fourteenth Amendment or the Confrontation Clause of the Sixth Amendment to be present at the preliminary proceeding and to personally confront the witnesses who would testify against him at trial. Assuming the right to face-to-face confrontation with adverse witnesses in such proceedings is guaranteed by the Sixth and Fourteenth Amendments,[1] this Court has established that the right to confront witnesses, although fundamental, is not absolute. Indeed, "competing interests, if 'closely examined,' . . . may warrant dispensing with confrontation" during criminal proceedings. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980), quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

The primary interest protected by the Confrontation Clause is the integrity of the fact-finding process. This interest is secured through the right of cross-examination, the right to compel adverse witnesses to testify under oath, and the right to have witnesses testify in open court so that the jury or other factfinder may observe the witness' demeanor. *See California v. Green*, 399 U.S. 149 (1970). Over the years, the Court has identified various interests that compete with defendants' rights to confront witnesses against them, and various formula-

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[1] *Amicus* expresses no view as to the applicability of the Sixth Amendment's Confrontation Clause, or the requirements of the Fourteenth Amendment's Due Process Clause, in the context of pretrial proceedings to determine the competency of adverse witnesses. *Amicus* seeks to inform the Court, should it determine that defendants are entitled to face-to-face confrontation in such preliminary proceedings with the witnesses who will testify against them at trial, of the extent to which current empirical and clinical mental health data support assumptions regarding the traumatic effects of such confrontation on child witnesses as a basis for dispensing with defendants' rights in these circumstances.

tions for weighing those interests against the core values served by the Confrontation Clause. Essentially, the formulations used to dispense with defendants' confrontation rights require an assessment of relevant "public policy" considerations and the "necessities of the case." *Ohio v. Roberts*, 448 U.S. at 64, quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895). So long as the testimony sought to be admitted bears sufficient "indicia of reliability" to provide the trier of fact with "a satisfactory basis for evaluating [its] truth," face-to-face confrontation at trial may give way to these competing interests. *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *California v. Green*, 399 U.S. 149, 161 (1970). *See also Ohio v. Roberts*, 448 U.S. 56 (1980).

The "indicia of reliability" test is traditionally used to determine the constitutional admissibility of unconfronted hearsay evidence where the witness is "unavailable." *Ohio v. Roberts*, 448 U.S. at 65-66. Because this case does not involve the admissibility of hearsay testimony by unavailable witnesses—indeed, the witnesses were examined, and cross-examined by Respondent's counsel, before the finder-of-fact—regarding the substantive allegations against the defendant, the "reliability" inquiry under the Confrontation Clause must be adapted to reflect these differences. Should the Court determine that the Confrontation Clause applies to these proceedings, the "reliability" inquiry is more appropriately directed to the process by which trial courts reach a competency determination than to the "reliability," or trustworthiness, of particular testimony by unconfronted witnesses. Thus, the Respondent's ability to contribute, by his presence, to the reliability and accuracy of the court's determination of the witness' competency must be weighed against the extent to which his presence would affect adversely the reliability and accuracy of the competency determination.

Similarly, the Due Process Clause guarantees criminal defendants the right to be present at all stages of the

proceedings against them, even where they are not actually "confronting" witnesses or evidence against them, where their presence bears a "reasonably substantial [relation] to [the] opportunity to defend" and the defendants' absence "might frustrate the fairness of the proceedings." *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934); *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975). This, too, requires a balancing of relevant competing interests to assess the fairness of the proceeding. (Point I.)

This Court has recognized the safeguarding of the psychological well-being of minors as a "compelling" interest. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 607. Many lower courts have dispensed with defendants' confrontation rights when necessary to facilitate the testimony of child victims of alleged sexual abuse and to protect child victims from the further psychological trauma of testifying in open court, in the presence of the alleged offender. *See, e.g., State v. Taylor*, 704 P.2d 443 (N.M. App. 1985); *Moll v. State*, 351 N.W.2d 639 (Minn. App. 1984); *People v. Breitweiser*, 349 N.E.2d 454 (Ill. App. 1976). *Amicus* submits that *only* in those circumstances where the risk of such trauma is documented, and its nature and potential duration are believed to be substantial, should the defendant's right to face-to-face confrontation with the child victim give way to the State's dual interests in securing the testimony of children who are frequently the only witnesses to the abuse and protecting child victims from the additional trauma of testifying before the alleged offender. Because of the fundamental importance of confrontation in our adversary system, and the tentative state of empirical and clinical findings regarding the effects on child sexual assault victims of confrontation with their alleged offenders, *amicus* further urges the Court to limit its holding regarding the proper weight to be ac-

corded the State's interest in protecting child victims to preliminary hearings to determine the child's competency.

To date, there is very little social science data to support the general proposition that face-to-face confrontation by child victims of sexual abuse with their alleged abusers has any more negative psychological effects than such confrontation has for adult victims. Indeed, there are some studies that suggest that child victims who testify before their alleged offenders experience the psychological benefits of vindication and regaining control over their lives. Although this area is currently the subject of ongoing studies by mental health professionals, it is too early to predict the results of these studies. Until we know more about the psychological effects on child victims, as a group, of testifying in open court before their alleged offenders to support valid assumptions about negative effects on such children, *amicus* urges the Court to require the government to make a preliminary showing of substantial psychological trauma to the individual child witness it seeks to protect. The trial court may then proceed, before dispensing with the alleged offender's rights under the Confrontation Clause and Due Process Clause, to evaluate, on a case-by-case basis, and with the assistance of expert testimony if necessary, the nature, extent and potential duration of the trauma to the child of testifying in the particular setting under review.[2] (Point II.)

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[2] This approach is consistent with that suggested by the American Bar Association's National Legal Resource Center for Child Advocacy and Protection:

> The choice of alternatives for taking a child's testimony should depend upon the needs and problems of a particular child. For some children, testifying in front of the defendant may not be as traumatic as sitting on the witness stand in a formal courtroom with an audience full of strangers and the press or with the jury present. A videotaped deposition with the defendant present may be the proper mechanism for such a child. In juvenile court child protection cases, children may be interviewed in the judge's chambers (generally with the parent alleged to have committed the abuse present), providing a less formal setting in which the child may be examined and cross-examined. Other children may not be disturbed by testifying in the presence of the public or the jury, but terrified of facing the defendant. Still other children may only require an advocate, close friend or relative in order to feel less traumatized. Finally, some children may find testifying a helpful experience in dealing with the abuse and may not be traumatized at all.

Child Sexual Abuse Law Reform Project, National Legal Resource Center for Child Advocacy and Protection of the American Bar Association, *Evidentiary and Procedure Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases* (1985) at 10.

ARGUMENT

I. ASSUMING DEFENDANTS HAVE A RIGHT TO PERSONALLY CONFRONT ADVERSE WITNESS IN PRETRIAL HEARINGS TO DETERMINE THE COMPETENCY OF WITNESSES TO TESTIFY, IT MAY BE DISPENSED WITH WHEN NECESSARY TO PROTECT CHILD VICTIMS OF SEXUAL ABUSE FROM SUBSTANTIAL, IDENTIFIABLE TRAUMA.

The right to confrontation, secured by the Sixth and Fourteenth Amendments,[3] ensures defendants the right, "[i]n all criminal prosecutions, . . . to be confronted with the witnesses against [them]." U.S. Const. amend. VI. The "main and essential purpose" of confrontation is to secure for the accused the opportunity to confront, or challenge, the witnesses against him or her in a face-to-face encounter[4] in front of the trier of fact. *Dela-*

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[3] The Sixth Amendment's Confrontation Clause is made applicable to the States through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965). *See also Douglas v. Alabama*, 380 U.S. 415 (1965).

[4] Although recognizing the Court's usage in its early cases of the words "face-to-face" to describe the guarantees of the Confrontation Clause, some commentators suggest that this language merely

ware v. Fensterer, 106 S.Ct. 292 (1985). *See California v. Green*, 399 U.S. 149, 156 (1970); *Mattox v. United States*, 156 U.S. 237 (1895). *See also Lee v. Illinois*, 106 S.Ct. 2056 (1986); *Ohio v. Roberts*, 448 U.S. 56 (1980). This purpose is served primarily through cross-examination.

The Court has recognized that the right to confront and cross-examine adverse witnesses serves both symbolic and functional goals:

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supports the right of cross-examination and does not require physical confrontation between the defendant and adverse witnesses. *See, e.g.*, Note, 98 HARV. L. REV. 806, 823 (1985). The Court also has used the words "face-to-face" to refer to the confrontation between the adverse witness and the trier of fact (*e.g.*, "compelling [the witness] to stand *face to face with the jury* in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (Emphasis added)). *Mattox v. United States*, 156 U.S. at 242-43. *See also Douglas v. Alabama*, 380 U.S. 415, 418, 419 (1965) ("[A] primary interest secured by [the Confrontation Clause] is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation.").

If physical confrontation is not required, technological developments that permit cross-examination and credibility assessment by the factfinder without the witness' physical presence, such as closed circuit television, which could not have been anticipated by the Court in earlier times, may satisfy the guarantees of the Confrontation Clause. However, this analysis ignores the defendant's right, rooted in the Confrontation Clause, to be present during the "critical stages" of criminal proceedings—which clearly includes cross-examination of adverse witnesses during the trial—as well as the independent "reliability" value that defendants' presence, "face-to-face" against adverse witnesses, has on the testimony of those witnesses. *See Illinois v. Allen*, 397 U.S. 337 (1970). *See also United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979) ("The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel.") (footnote omitted).

> [Confrontation and cross-examination] contribute[] to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial. The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals.
>
> [In addition,] [t]he right to confront and to cross-examine witnesses [serves] [the] primar[y] functional [goal of] promot[ing] reliability in criminal trials.

Lee v. Illinois, 106 S.Ct. at 2062. The reliability or truthfinding goal of confrontation is advanced by: 1) ensuring that adverse witnesses give their statements under oath; 2) forcing adverse witnesses to submit to cross-examination; and 3) "compelling [adverse witnesses] to stand face to face with the jury in order that they may look at [the witnesses,] and judge by [their] demeanor upon the stand and the manner in which [they] give [their] testimony whether [the witnesses are] worthy of belief." *Mattox v. United States*, 156 U.S. at 242-43. *See also California v. Green*, 399 U.S. at 158.

Although the absence of these safeguards " 'calls into question the ultimate "integrity of the fact-finding process[,]" ' " *Ohio v. Roberts*, 448 U.S. at 64, quoting *Chambers v. Mississippi*, 410 U.S. at 295, quoting *Berger v. California*, 393 U.S. 314, 315 (1969), the Court has held that the right to confront adverse witnesses is not absolute. The rights of confrontation and cross-examination, "however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. United States*, 156 U.S. at 243. *See also Ohio*

v. Roberts, 448 U.S. at 64, quoting *Chambers v. Mississippi*, 410 U.S. at 295 ("competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial.").

The competing interest that courts have recognized most often as sufficient to warrant dispensing with confrontation at trial in appropriate circumstances is the government's interest in effective law enforcement and prosecution. *See, e.g., Ohio v. Roberts*, 448 U.S. at 64; *Snyder v. Massachusetts*, 291 U.S. 97 (1934). For example, the right to confrontation has given way to the government's law enforcement interest to allow into evidence hearsay statements bearing "adequate indicia of reliability" by witnesses who are unavailable or for whom the utility of trial confrontation is remote. *See Ohio v. Roberts*, 448 U.S. at 65-66 & n.7; *Dutton v. Evans*, 400 U.S. 74, 89 (1970). In addition, the government's interest in the "proper administration of criminal justice" in the courtroom has been held to outweigh an unruly and disruptive defendant's Sixth Amendment right to be present during his trial and to personally confront the witnesses against him. *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (waiver of Sixth Amendment rights and removal from courtroom justified by defendant's disruptive behavior).[5]

The Court long ago recognized that these exceptions to the right to confrontation and cross-examination are "not . . . static, but may be enlarged from time to time

[5] The right to be present at trial is implicit in the defendant's right to confront adverse witnesses. *United States v. Gagnon*, 470 U.S. 522 (1985); *Illinois v. Allen*, 397 U.S. at 338. The defendant's presence serves the Confrontation Clause's reliability goals by permitting more effective cross-examination by defendant's counsel and by "mak[ing] it more difficult [for adverse witnesses] to lie against . . . [the] accused . . . ." *Ohio v. Roberts*, 448 U.S. at 64, n.6. *See also Rushen v. Spain*, 464 U.S. 114, 129-30, n.8 (1983) (Stevens, J. concurring). *See generally* n.4, *supra*.

if there is no material departure from the reason of the general rule." *Snyder v. Massachusetts*, 291 U.S. at 107. "[A]ll that the Sixth Amendment demands [is] 'substantial compliance with the purposes behind the confrontation requirement.'" *Ohio v. Roberts*, 448 U.S. at 69, quoting *California v. Green*, 399 U.S. at 166 (footnote omitted). Although the applicability of the Sixth Amendment's Confrontation Clause to pretrial determinations of an adverse witness' competency is far from clear,[6] assuming *arguendo* that the Confrontation Clause does apply to such proceedings, the state's interest in "safeguarding the physical and psychological well-being of . . . minor[s]", recognized by this Court as "compelling,"[7] should provide a sufficient basis for an exception

[6] The Confrontation Clause guarantees the right to be present and to participate in the cross-examination of adverse witnesses in criminal proceedings. Whether that right extends to pretrial competency examinations of adverse witnesses where no testimony relating to the substantive allegations against the defendant is heard has not been decided by this Court. Indeed, the Court in *Snyder* suggested that the Confrontation Clause is limited to the stages of the criminal proceedings where factual testimony bearing on the accused's guilt or innocence is elicited:

> Many motions before trial are heard in the defendant's absence, and many motions after trial or in the prosecution of appeals. Confusion of thought will result if we fail to mark the distinction between requirements in respect of presence that have their source in the common law, and requirements that have their source, either expressly or by implication, in the federal constitution. Confusion will result again if the privilege of presence be identified with the privilege of confrontation, which is limited to the stages of the trial when there are witnesses to be questioned. "[Confrontation] was intended to prevent the conviction of the accused upon depositions of ex parte affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination."

291 U.S. at 107, quoting *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (citations omitted).

[7] *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

to confrontation if there is a substantial and demonstrated threat to the well-being of a minor witness and the underlying values of confrontation are preserved. *See generally Ohio v. Roberts*, 448 U.S. at 66.

In the context of pretrial proceedings to determine a child's competency, where there is no substantive testimony regarding the allegations against the accused, the "reliability" values of the Confrontation Clause are more appropriately served by identifying the factors that will ensure a reliable or accurate determination by the court of the child's competency, rather than the trustfulness of the child's testimony. Thus, whether child witnesses are placed under oath seems to be less significant in this context than whether the factfinder is able to observe their demeanor while testifying. It is highly doubtful that the absence of an oath will render the child witness' testimony less solemn or truthful than it otherwise would be. Assuming that the questioning by the court and counsel refers to background factual information about the witness, *e.g.*, birthday, the name of school and teachers, understanding of the difference between the truth and falsehoods, and belief as to the consequences of not telling the truth,[8] and does not refer to the substantive allegations against the accused, there is little incentive for the child to lie, either to protect or to punish the accused. Indeed, false statements by the witness in response to such questioning would work to the accused's advantage by undermining the child's competence as a witness, thereby preventing the child from testifying at trial about the substantive allegations.

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[8] In Kentucky, as in most states, the standard for determining a child's competency to testify is "whether the child is sufficiently intelligent to observe, recollect and narrate the facts and has a moral obligation to speak the truth." *Capps v. Commonwealth*, 560 S.W.2d 559 (Ky. 1977).

Similarly, at least in some circumstances, cross-examination by the accused's counsel *with the accused present*, will assist the court in making a reliable determination of a child's competency. Those circumstances include those similar to the case *sub judice*, in which the accused lives with the child witness and may have some special knowledge of the child's intellectual and moral capacities which bears on the child's competency.

Unlike the Confrontation Clause, the Due Process Clause guarantees criminal defendants the right to be present during proceedings where they are not actually confronting witnesses or evidence against them if such proceedings are "critical" to the outcome of the trial. *Rushen v. Spain*, 464 U.S. 114, 117 (1983). *See United States v. Gagnon*, 470 U.S. 522 (1985). The standard articulated by the Court for assessing the "criticalness" of the proceeding is whether a "fair and just hearing would be thwarted by [the accused's] absence" or whether the accused's presence "bear[s] a relation, reasonably substantial, to his opportunity to defend" against the criminal charges against him. *Snyder v. Massachusetts*, 291 U.S. at 108, 106. *See also United States v. Gagnon*, 470 U.S. 522 (1985); *Faretta v. California*, 422 U.S. 806 (1975). Thus, as with the inquiry under the Confrontation Clause in these circumstances, the determination of the accused's right to be present during competency evaluations of adverse child witnesses requires a balancing of the accused's role in assisting the court to reach an accurate and reliable determination of the child's competence as a witness, against the risk of identifiable and substantial injury to the child witness from the presence of the accused at the proceeding.

Although it may be argued that competency determinations which bear no relation to the charges against the defendant, and are committed to the judgment of the court, are purely legal determinations, as noted above, in circumstances where the defendant may have intimate knowledge of the witness' intellectual and moral capaci-

ties, the ability to be present and assist counsel in cross-examining the child may have a sufficient impact on the outcome of the trial to render the pretrial competency evaluation a "critical stage" of the proceedings. Moreover, apart from any special knowledge the defendant may have of the child witness, because frequently the child witness is the only prosecution witness in such cases, and because the accused may be able to raise sufficient doubt at the competency evaluation about the child's ability to testify truthfully and accurately to warrant a finding of incompetency—thereby removing the chief adverse witness—the preliminary competency hearing in such cases may, in fact, constitute a "critical stage" of the proceedings for the accused.

Assuming Respondent was entitled under either the Confrontation Clause or the Due Process Clause to be present during the preliminary competency evaluations of the child witnesses in this case, and assuming further that Respondent's presence would have had little or no effect on the reliability or accuracy of the court's competency determinations and little or no bearing on the fairness of the proceedings or Respondent's opportunity to defend himself, the critical question for the Court is whether the State had a legitimate competing interest that outweighed Respondent's right to be present at the proceeding. In the case *sub judice*, there was no finding that the particular child witnesses would be traumatized by the presence of Respondent in the judge's chambers during their testimony. Because, as *amicus* will demonstrate below, there is insufficient social science data at this time to support a *general* presumption of psychological trauma in child victims of sexual assault in such circumstances, a specific finding that there is a risk of substantial identifiable psychological trauma to the child witness should be necessary before dispensing with an accused's rights.

Because the trial court may not have been aware that the view that child victims of sexual assault are subjected

to substantial emotional and psychological trauma when forced to testify in the presence of their alleged abusers, although generally held, is not supported by relevant social science data, *amicus* urges this Court, if it finds that Respondent had a constitutional right to be present during the competency hearing, to remand this case for a specific determination of the effects on the witnesses of Respondent's presence during the hearing.

II. BECAUSE SCIENTIFIC DATA REGARDING THE EFFECTS ON CHILD VICTIMS OF SEXUAL ABUSE OF CONFRONTING THEIR ALLEGED ABUSERS IN THE COURTROOM ARE SPARSE AND INCONCLUSIVE, CASE-BY-CASE DETERMINATION OF THE EFFECTS ON INDIVIDUAL CHILDREN IS MOST APPROPRIATE.

With the incidence of reported cases of sexual abuse of children increasing, courts and legislatures have begun to develop innovative procedures governing the testimony of child victims, particularly in criminal proceedings. These procedures are premised largely on the view that child victims of sexual abuse are extremely fragile and vulnerable and are highly traumatized emotionally and psychologically by their participation in the criminal justice system. *See, e.g., Child Victim Witness Protection Act of 1985: Hearings on S. 1156 Before the Subcommittee on Juvenile Justice of the Senate Comm. on Judiciary*, 99th Cong., 1st Sess. (1985); AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE FAIR TREATMENT OF CHILD WITNESSES IN CASES WHERE CHILD ABUSE IS ALLEGED (1985); Whitcomb, Shapiro & Stellwagen, *When the Victim is a Child: Issues for Judges and Prosecutors*, NATIONAL INSTITUTE OF JUSTICE (1985). "Thus far, [however,] no compelling case has been made that sexually abused children as a class are sufficiently different from other witnesses to justify abrogation of [the] long-standing attributes of [our] adversary system." Melton, *Children's Testimony in Cases of Alleged Sexual Abuse*,

to be published in ADVANCES IN DEVELOPMENTAL AND BEHAVIORAL PEDIATRICS (Wolraich & Routh, eds, 1987). *See generally* Melton & Thompson, *Getting Out of a Rut: Detours to Less Traveled Paths in Child Witness Research, to be published in* CHILDREN'S EYEWITNESS MEMORY (Ceci, Toglia, & Ross eds. *in press*) at 28 ("It is not self-evident that child victims of sexual abuse, for example, are at a substantially greater risk from testimony under conventional procedures than other child victims, child witnesses of violent offenses, adult victims of sexual offenses, or even witnesses in general.").

The view that children are especially vulnerable in legal proceedings is based much more on emotion, intuition and commonly held assumptions about what children are like than on analyses of reliable scientific data in this area. For example, the assumption by the dissenters in *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 618, n.7, and others, that "certainly the [traumatic] impact of [trial procedures] on children must be greater" than on adult victims of sexual offenses sounds plausible. Commenting on this assumption, one social scientist agrees that children "are less likely than adults to have the cognitive and emotional resources for understanding the experience, and legal authorities [who are] not used to communicating with children may find it difficult to allay their concerns." Melton, *Sexually Abused Children and the Legal System: Some Policy Recommendations*, 13 AM. J. FAMILY THERAPY 61, 64-65 (1985) (citations omitted). But these assumptions fail to take into account alternative theories about the impact of trial procedures on children:

> [P]articularly for young children, it is equally plausible that children's responses are less severe on average than those of adults. Provided that parents and others do not overreact and that they are supportive of the child during the legal process, it may well be that the trial experience will cause little trauma. At least for some child victims, the experience may be cathartic; it provides an opportunity for taking control of the situation, achieving vindication, and symbolically putting an end to the episode.

Id.

To date, the "research" on the effects on child victims of sexual assault of testifying in courts consists primarily of anecdotal and clinical reports from special projects. For a critique of these reports, *see generally* Melton & Thompson, *Getting Out of a Rut, supra;* Whitcomb, *et al., When the Victim is a Child, supra;* Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125 (1984); Goodman, *The Child Witness: Conclusions And Future Directions For Research And Legal Practice*, 40 J. SOC. ISSUES 157 (1984). Because assumptions about these psychological issues underlie much of the public, legislative and judicial response to the problems of child testimony in child sex abuse cases, *amicus* believes it is important to inform the Court about the current limits of social science knowledge in this area.

Amicus is aware of no social science studies that have focused exclusively on the psychological effects on child victims of sexual assault of testifying in the presence of their alleged offenders. Until those studies have been performed, however, it is possible to extrapolate, with some qualifications, from the few existing studies on child victims' reactions to their involvement in the legal process, including testifying in court. Essentially, those studies suggest that although involvement in the legal process is harmful to some children, it is beneficial to others. The significance of these findings for the issues raised by this case is two fold: first, these studies show that children's reactions to involvement in the legal process in general, and testifying in courts in particular (without regard to the presence of the alleged offender in the courtroom), are complex and variable; second, these studies suggest that previously widely held assumptions about the effects on child victims who participate as witnesses in the legal process are not supported by the scientific data. Thus,

Concern about the potential trauma to child victims of sexual assault who are "revictimized" during the legal process has led to the premature development of assumptions by courts and legislatures about the nature and degree of the "revictimization." Confrontation by the defendant and defense counsel has been perceived by these and other clinical observers as particularly traumatic. Although *amicus* does not wish to minimize the risks of trauma that have been present in a few highly sensationalized cases in which child victim/witnesses are reported to have been badgered,[12] both psychological theory and clinical experience suggest that the emphasis on "protecting" child victims from testifying and other aspects of participation in the legal process may be misplaced.

Social psychological research and theory regarding adult participants in legal proceedings indicate that control is a significant factor in determining perceptions of justice. Adult litigants and witnesses tend to perceive adversary procedures as fairest, apparently because such procedures permit each side to control the presentation of its case. *See, e.g.*, Thibaut & Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541-66 (1978). Some researchers in the area of children and the law have argued that these findings are likely to be generalizable at least to older children and adolescents. *See, e.g.*, Melton, *Decision Making by Children: Psychological Risks and Benefits*, in CHILDREN'S COMPETENCE TO CONSENT 21-40 (Melton, Koocher & Saks eds. 1983); Melton & Lind, *Procedural Justice in Family Court: Does the Adversary Model Make Sense?*, in LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES 64-83 (Melton ed.

[12] *See, e.g., California v. McMartin*, Grand Jury Indictment A750900, Preliminary Hearing A753005 (L.A. Mun. Ct. 1985) (During pretrial proceedings, 10-year-old child, who was only one of several children called to testify, was on the witness stand every day for over one week; his testimony included cross-examination by seven defense attorneys.).

1982). For these older children, the experience of testifying in court, even if stressful at the time, with adequate preparation and follow-up, is likely to heighten their sense of control and perception of justice, and provide some psychological closure to their victimization.[13] Similarly, excluding children, or "protecting" them, from the adversary process may have negative effects. It is well-established that ambiguity fosters anxiety and that children may be more troubled by what they think is happening in courtrooms from which they are excluded than by what they would experience if they were direct participants in the process. *See generally* Dibner, *Ambiguity and Anxiety*, 56 J. ABNORMAL & SOC. PSYCHOLOGY 165-74 (1954).

This view is supported by clinical experience. Clinicians at two recent demonstration projects on child sex abuse found that children often feel empowered by the opportunity to tell their story. Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125-37 (1984). One group noted that "the experience of testifying in court can have a therapeutic effect for the child victim. The child can learn that social institutions take children seriously. Some children report feeling empowered by their participation in the process. Some have complained, when the offender pled

[13] *See, e.g.*, Melton & Thompson, *Getting Out Of A Rut, supra* at 23:

> Given the unpleasantness of the circumstances that compel exercise of the authority of the legal system, the serious and somewhat unpredictable consequences of testimony, and the evaluation of performance attached to the task of testimony, a lack of anxiety would be surprising, regardless of the age of the witness. However, distress, especially if transient, does not necessarily reflect dissatisfaction. The awesome nature of the courtroom and the adversariness of the procedure—the opportunity for all parties to have a say—may be more important subjectively than the discomfort experienced. Over the long term, the child's perception of being treated fairly may be more significant than the level of anxiety experienced.

guilty, that they did not have an opportunity to be heard in court." *Id.* at 135. Similar observations were made by the second group of clinicians:

> [T]he court proceeding can have beneficial outcomes for the child. Children, like adults, often have strong feelings regarding their victimization and want the offender to be punished for his wrongdoing. Court proceedings are the only way that the victim can legally seek retribution against the perpetrator. Older children in particular often have a strong sense of social responsibility and will choose to proceed with prosecution even though it may be stressful in the belief that they are helping to protect other children from being victimized. In many instances, court proceedings also serve to enhance the child's sense of personal vindication—others are treating the child's victimization as a serious matter [and]; are tangibly expressing their trust and faith in the child's story.

Rogers, *Child Sexual Abuse and the Courts: Preliminary Findings*, in SOCIAL WORK AND CHILD SEXUAL ABUSE 145-53, 150 (Conte & Shore eds 1982). But these studies, and others like them, may be criticized because they result from clinical rather than empirical research.[14]

Two current empirical studies are focusing specifically on the effects on child victims of testifying in court. In neither study is the presence of the alleged offender in the courtroom isolated as a separate factor; however, the offender is present in most of the courtroom settings examined by the researchers and thus, is subsumed as a contributing factor to the effects noted. Although the data from these two studies are still very preliminary, initial judgments gleaned from impressions of the data

[14] Clinical studies often rely on interviews by mental health professionals. They may not contain adequate control groups and other procedures used by experimental social scientists to ensure that the study is performed with methodological rigor. *See,* J. MONAHAN & L. WALKER, SOCIAL SCIENCE IN LAW, 33-81 (1985).

suggest a wide range of reactions in such children, from extreme anxiety to increased sense of control.[15] Researchers and clinicians still do not know why court appearances are harmful for some children and beneficial for others, or which circumstances lead to trauma and which to catharsis. There is some support for the view that strong family support, adequate preparation for the process,[16] and careful follow-up and management during the child's participation in the legal process are the most effective means of reducing the stress inherent in testifying, and thereby increasing the likelihood of a positive experience. *See, e.g.*, Melton, *Children's Testimony in Cases of Alleged Sexual Abuse, supra*; Berliner & Barbieri, *Legal Testimony By Child Victims of Sexual Assault, supra.*

Some commentators and clinicians have raised concerns about the effects on child victims of seeing the de-

[15] One of the studies compares child victims of sexual assault who testify in criminal proceedings with a matched sample of child victims who do not testify. This study, by Professor Goodman at the University of Colorado, preliminarily suggests that the wide range of reactions in the children may be a function of the levels of support from their families. The second study is an ongoing study by Professor Runyan at the University of North Carolina, the preliminary data from which suggest that child victims who testify in family court proceedings show disproportionate gains in psychological adjustment. However, the nonequivalence between the testifying and nontestifying groups in functioning at intake leaves some ambiguity about whether the substantially greater improvement of children who testified resulted from the testimony or simply the passage of time. Copies of these preliminary data may be obtained from *amicus*.

[16] Such preparation might include enhancing the child's communication skills through dolls, artwork and simplified vocabulary, briefing the child on the roles of the courtroom personnel, introducing them to the judge, taking them on a tour of the courtroom, and allowing them to sit in the witness chair and speak into the microphone. Whitcomb, *Child Victims in Court: The Limits of Innovation*, 70 JUDICATURE 90 (1986).

fendant in the courtroom setting. Although there are no systematic studies which have isolated this factor, there is anecdotal support for the view that many child victims of sexual abuse do fear seeing the alleged offender again. *See, e.g.*, Whitcomb, Shapiro & Stellwagen, *When the Victim Is A Child, supra* at 17-18:

> Most [professionals who work with child victims in counseling or in the court room] stressed that children's abilities to cope with the judicial process varied a great deal, depending on age and circumstances. There were many common themes, however. The most frequently mentioned fear was facing the defendant. That experience is frightening for most adults, but to a child who does not understand the reason for confrontation, the anticipation and the experience of being in close proximity to the defendant can be overwhelming.

See generally Berliner & Barbieri, *Testimony of the Child Victims of Sexual Assault, supra.* For some children, *e.g.*, those who have been threatened with death or bodily harm to themselves or loved ones if they tell what happened, it is reasonable to assume that the fear may rise to a level of terror.

There are equally plausible reasons, however, based on existing studies, to suppose that children may benefit from testifying before their alleged offenders. For example, just as testifying may engender in children an enhanced sense of control over their lives, testifying before their alleged offenders may produce a sense of vindication by facilitating the resolution of conflicting feelings about the abuse, encouraging the children to see that the abuse was not their fault, and allowing children to experience the satisfaction, from their willingness to confront their abuser, of having contributed to an appropriate resolution of the case. In addition, the demonstrated role that adequate preparation plays in reducing the stress and trauma experienced by child witnesses suggests that testifying in front of the alleged offender during preliminary competency hearings in the judge's chambers—a more informal and less awesome setting than the courtroom—may serve to lessen the trauma for the child who is found competent who will eventually testify in front of the offender at trial.

Because so little is known at this point about the effects on child victims of sex abuse of testifying in front of their alleged offenders, and indeed, social scientists may discover that generalizations about all children are invalid, *amicus* urges the Court to refrain from making any broad generalizations about the trauma experienced by child victims in these circumstances. Rather, *amicus* respectfully suggests that case-by-case determinations of the effects on individual children be made before defendants' rights are infringed or courtroom procedures are otherwise modified. In this way, modifications may be tailored to fit the needs of the particular child witness at issue, balanced against the defendant's interests in presence and confrontation in those circumstances, and thereby prevent overbroad infringement of the defendant's rights.

Such determinations readily could be made in preliminary proceedings, upon the government's motion to exclude the defendant or otherwise modify the trial procedure. In these proceedings the court would determine whether such modifications were necessary in light of "the minor['s] . . . age, psychological maturity and understanding, the nature of the offense, the desires of the [witness], . . . the interests of parents and relatives[,]" and any expert testimony by qualified mental health professionals regarding the nature, degree and duration of potential injury to the child from testifying. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 608. *Amicus* respectfully urges that because of the nature of the rights at stake and the tentative state of the social science data to support the experience of trauma in child

witnesses, the showing of potential trauma required by the state in order to override defendants' rights be specific and substantial.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court, should it find that Respondent was constitutionally entitled to be present and confront the accusing child witnesses during their competency evaluations, to remand to the trial court for a determination of whether the interests of the child outweighed Respondent's rights in these circumstances.

Respectfully submitted,

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BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

COMMONWEALTH OF KENTUCKY

Petitioner

versus

SERGIO STINCER

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR AMICI CURIAE IN SUPPORT OF PETITIONER BY THE ATTORNEY GENERAL OF ARKANSAS AND THE STATES THAT APPEAR ON THE INSIDE COVER

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
INTERESTS OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. THE DEFENDANT'S INTERESTS IN PRESENCE AT THE COMPETENCY HEARING, WHEN CONSIDERED UNDER BOTH DUE PROCESS AND CONFRONTATION CLAUSE ANALYSIS, MUST BE ASSESSED IN LIGHT OF A BALANCING TEST IN WHICH THE DEFENDANT'S INTERESTS ARE WEIGHED AGAINST THE RISK OF ERROR AND THE STATE'S INTERESTS IN PROTECTING THE CHILD	7
A. Neither the Due Process Nor Confrontation Clause Interests in Presence at All Stages of the Trial are Absolute, But Rather Require a Balancing of Competing Interests	6
B. The Interest of the Defendant in Personal Presence at the Competency Hearing is Miniscule	9
C. The Defendant's Confrontation Clause Interests are Fully Protected by Subsequent Full Confrontation and Cross Examination at Trial	11

II. THE ACCURACY OF THE TRIAL COURT'S COMPETENCY DETERMINATION IS NOT ENHANCED BY THE DEFENDANT'S PRESENCE 16

III. THE STATE INTEREST IN EXCLUDING THE DEFENDANT IS COMPELLING, IN LIGHT OF THE OVERWHELMING EVIDENCE OF PSYCHOLOGICAL TRAUMA TO THE CHILD CAUSED BY REPEATED CONFRONTATIONS WITH THE OFFENDER 22

A. The State Has a Powerful Interest in Minimizing Psychological Trauma to the Child Victim of Sex Abuse 22

B. The Strength of the State Interest is Evidenced by a Nationwide Legislative Trend Toward Reforming Procedures in Child Abuse Cases 27

C. This Court has Already Acknowledged that the State has a Compelling Interest in Protecting the Child Sex Abuse Witness, and the Kentucky Procedure is Narrowly Tailored to Effectuate that Interest 33

CONCLUSION 36

TABLE OF AUTHORITIES

	PAGE
CASES:	
Boddie v. Connecticut, 401 U.S. 371 (1971) .	7
Cafeteria Workers v. McElroy, 367 U.S. 886 (1961)	7
California v. Green, 399 U.S. 149 (1970) . .	11
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	7,8
Globe Newspapers Co. v. Superior Court, 457 U.S. 596 (1982)	33
Illinois v. Allen, 397 U.S. 337 (1970) . . .	9
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	8
Matthews v. Eldridge, 424 U.S. 319 (1976) .	7,8
Moll v. State, 351 N.W.2d 639 (Minn. Ct. App. 1984)	10,17,19
Morrissey v. Brewer, 408 U.S. 471 (1972) . .	7
Ohio v. Roberts, 448 U.S. 56 (1980)	8
Pennington v. State, 331 So.2d 411 (Ala. 1976)	21
People v. Breitweiser, 38 Ill. App. 3d 1066, 349 N.E.2d 454 (1976)	18,21
Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)	33,34

TABLE OF AUTHORITIES (continued)

	PAGE
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	33
Rushen v. Spain, 464 U.S. 114 (1983)	6,9
Snyder v. Massachusetts, 291 U.S. 97 (1934)	9,14,16
State v. Madrid, 74 Idaho 200, 259 P.2d 1044 (1953)	21
State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977)	21
State v. Ritchey, 107 Ariz. 552, 490 P.2d 558 (1971)	10,11
State v. Robinson, 310 N.C. 530, 313 S.E.2d 571 (1984)	21
State v. Taylor, 704 P.2d 443 (N.M. App. 1985)	19
State v. Woodward, 32 Wash. App. 204, 646 P.2d 135 (1982)	21
Stincer v. Commonwealth, 712 S.W.2d 939 (Ky. 1986)	13
Toney v. Bouthillier, 129 Ariz. 402, 631 P.2d 557 (Ariz. Ct. App. 1981)	21
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United States v. Morrison, 449 U.S. 361 (1981)	7
Waller v. Georgia, 467 U.S. 39 (1984)	33,34

TABLE OF AUTHORITIES (continued)

	PAGE
STATUTES:	
Act of May 29, 1985, Act No. 85-743, 1984 Ala. Acts	30
Alaska Stat. § 12.40.110 (1985)	29
Alaska Stat. § 12.45.047 (1984)	30
Ariz. Rev. Stat. Ann. § 13-4253 (1985) . . .	30
Ariz. Rev. Stat. Ann. § 13-1416 (1985) . . .	29
Ark. R. Evid. 803(25)(A) (1985)	29
Ark. Stat. Ann. §§ 43-2035 to 2037 (1985) .	31
Ark. Stat. Ann. § 28-1001, R. 104(a) (1979)	21
Cal. Evid. Code § 1228 (West 1985)	29
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Colo. Rev. Stat. § 13-25-129 (1983)	29
Colo. Rev. Stat. § 18-3-413 (1984)	31
Act of July 8, 1985, Pub. Act No. 85-587, 1985 Conn. Legis. Serv. 463 (West) . .	31
Del. Code Ann. tit. 11, § 3511 (1985) . . .	31
Fla. Stat. § 90.803 (1985)	29
Fla. Stat. § 92.53 (1985)	31
Ill. Ann. Stat. ch. 38, § 115-10 (Smith-Hurd 1984)	29
Ind. Code Ann. § 35-37-4-6 (Burns 1985) . .	29

TABLE OF AUTHORITIES (continued)

	PAGE
Iowa Code § 232.96(6) (1985)	29
Iowa Code § 910A.3 (1985)	31
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Kan. Stat. Ann. § 60-460(dd) (1983)	30
Ky. Rev. Stat. § 421.350 (1984)	31
Me. Rev. Stat. Ann. tit. 22, § 1205 (1985) .	31
Me. Rev. Stat. Ann. tit. 15, § 1205 (1985) .	30
Mass. Gen. Laws Ann. ch. 278, § 16D (West 1985)	31
Minn. Stat. Ann. § 595.02(3) (West 1984) . .	30
Mo. Ann. Stat. §§ 491.680 to 491.687 (Vernon 1985)	31
Mo. Rev. Stat. § 491.075 (1985)	30
Mont. Code Ann. §§ 46-15-401 to 403 (1977) .	31
Act of June 12, 1985, Ch. 653, 1985 Nev. Stat. 2132	30
Act of June 3, 1985, Ch. 462, 1985 Nev. Stat.	31
N.H. Rev. Stat. Ann. § 517:13-a (1985) . . .	31
N.M. Stat. Ann. § 30-9-17 (1984)	31
N.Y. Crim. Proc. Law §§ 65.00 to 65.30 (McKinney 1985)	30

TABLE OF AUTHORITIES (continued)

	PAGE
Okla. Stat. Ann. tit. 12, § 2803.1 (West 1985)	30
Okla. Stat. Ann. tit. 22, § 753 (West 1984)	31
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S.D. Codified Laws Ann. § 23A-12-9 (1985)	32
Tenn. Code Ann. § 24-7-116 (1985)	32
Tex Fam. Code Ann. § 504.031 (Vernon 1985)	30
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Tex. Code Crim. Proc. Ann. art. 38.071 (Vernon 1983)	32
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Utah Code Ann. § 77-35-15.5 (1985)	32
Vt. R. Evid. 807 (1985)	32
Vt. R. Evid. 804(a) (1985)	30
Wash. Rev. Code Ann. § 9A.44.120 (1985)	30
Wis. Stat. § 967.04(7) (1983)	32
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TABLE OF AUTHORITIES (continued)

PAGE

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PAGE

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PAGE

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INTERESTS OF AMICI CURIAE

The State of Arkansas, on behalf of itself and Sister States joining this brief, is vitally interested in the resolution of the issues posed by efforts to provide procedural protection for children who testify as witnesses/victims in child sexual abuse prosecutions. Arkansas and other states across the nation have become increasingly concerned with the psychological trauma often visited upon children who have been victims of sexual abuse when those children are subsequently put through the ordeal of giving testimony in a criminal case. The states have a compelling interest in providing the maximum psychological shelter possible for the child victim/witness consistent with the Constitution. The issues posed by the competency hearing procedure utilized by the trial court in this case will substantially effect those state interests.

This brief addresses the balance between the Confrontation Clause and Due Process interests of the accused, and the state's interest in

protecting the psychological well-being of the child. It is urged that the exclusion of the defendant from the competency hearing is a narrowly tailored procedure well-calculated to minimize damage to the child while preserving all of the constitutional rights of the defendant.

For these reasons, the state of Arkansas urges this Court to reverse the judgment of the Supreme Court of Kentucky.

SUMMARY OF ARGUMENT

The defendant enjoys a fundamental right to presence at all critical stages of a criminal trial, a right that has roots in both the Confrontation and Due Process Clauses. Neither the Confrontation nor Due Process Clause rights are absolute, however. Both clauses require a balancing of competing interests. In the context of the Due Process analysis, the defendant's interests must be weighed against the increased accuracy that his presence will provide and the state's compelling interest in protecting the

child. In the Confrontaton Clause context the principal concern is whether the state procedure protects the defendant's opportunity for full cross-examination.

The defendant's interest in presence at the competency hearing is miniscule. The hearing in this case did not concern the merits, but merely the child's understanding of the obligation to testify truthfully. The defendant's lawyer was present and had the opportunity to engage in cross-examination. The defendant could have done nothing to meaningfully contribute to his opportunity to defend by being personally present.

All Confrontation Clause interests of the defendant were fully protected by the complete ability of the defendant to confront the child witness and subject the witness to cross-examination at trial. Just as this Court permits, under the Confrontation Clause, the admission of prior statements of a witness not subject to cross-examination who is presently available at a hearing and subject to

cross-examination, this Court should permit the initial competency hearing to be conducted without the personal presence of the defendant, as long as all confrontation rights are fully preserved at the subsequent trial.

The competency determination is made by the trial court, and is a mixed question of law and fact. The defendant's presence at the hearing is not likely to enhance the accuracy of the trial court's determination, and may actually decrease the judge's ability to correctly assess the child's competency. Since there is no constitutional right to a separate competency hearing at all, the state's procedure is actually more solicitous of the defendant's rights than if no prior hearing was provided, for it effectively gives the defendant two opportunities to attempt to discredit the child witness. Since this preliminary hearing is actually an addition to the full Confrontation rights preserved at trial, the defendant's personal contribution to the accuracy

of the determination is simply too insubstantial to be grounds for objection if he is excluded.

The state has a powerful compelling interest in reducing as much as possible the psychological trauma which may accompany participation by the child in the criminal justice process. The child's testimony is referred to by experts as the "second victimization." Social science data indicates that the psychological injury is substantially exacerbated by repeated confrontations with the offender. The strength of the state interest in reducing the trauma on the child is evidenced by the recent nationwide legislative trend toward reforming procedures in child abuse cases. This Court has recognized that providing psychological protection for the child witness in sex abuse cases is a compelling state interest. The Kentucky procedure followed in this case is narrowly tailored to effectuate that interest, and fully preserves the defendant's Due Process and Confrontation Clause rights at trial.

If this Court were, a this early juncture, to strike down this minimal, narrowly tailored protection of the child, it would substantially cripple the emerging nationwide effort to evolve an accomodation between the rights of the accused and the psychological health of the child victim.

ARGUMENT

I. THE DEFENDANT'S INTERESTS IN PRESENCE AT THE COMPETENCY HEARING, WHEN CONSIDERED UNDER BOTH DUE PROCESS AND CONFRONTATION CLAUSE ANALYSIS, MUST BE ASSESSED IN LIGHT OF A BALANCING TEST IN WHICH THE DEFENDANT'S INTERESTS ARE WEIGHED AGAINST THE RISK OF ERROR AND THE STATE'S INTEREST IN PROTECTING THE CHILD.

A. Neither the Due Process nor Confrontation Clause Interests in Presence at All Critical Stages of the Criminal Trial are Absolute, But Rather Require a Balancing of Competing Interests.

In Rushen v. Spain, 464 U.S. 114 (1983), this Court stated "emphatically" that the defendant's fundamental right to personal presence at a criminal trial must always be considered in light of "'the necessity for preserving society's interest in the administration of criminal justice,'" and that cases involving the right to

presence are "'subject to the general rule that remedies should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interests.'" Id. at 118, quoting United States v. Morrison, 449 U.S. 361, 364 (1981). In cases spanning the landscape of procedural due process issues addressed by this Court in the last two decades, it has repeatedly emphasized that due process analysis must be flexible, involving a balancing of competing interests. See, e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532, 543-43 (1985); Matthews v. Eldridge, 424 U.S. 319, 335-43 (1976); Boddie v. Connecticut, 401 U.S. 371, 378 (1971). The "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers v. McElroy, 376 U.S. 886, 895 (1961). Rather, "due process is flexible and calls for such procedural protecton as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). This Court has evolved a three-factor due process

calculus for balancing the competing interests, requiring an assessment of the importance of the individual interest implicated, the contribution of additional procedures to the reduction of the risk of error, and the magnitude of the governmental interests at stake. See, e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542-43 (1985); Logan v. Zimmerman Brush Company, 455 U.S. 422, 434 (1982); Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976).

This general due process methodology should give way to concentration on the more specific analysis of the Confrontation Clause with regard to the cross-examination concerns in this case. See United States v. Gagnon, 470 U.S. 522, 526 (1985). The primary purpose of the Confrontation Clause is preservation of the right to cross-examination. See Ohio v. Roberts, 448 U.S. 56, 62-70 (1980). When the concern shifts to the broader plane of a right to presence at the hearing, however, general due process analysis controls, even though the right to presence

clearly has roots in both the Due Process and Confrontation Clauses. See United States v. Gagnon, 470 U.S. at 526; Illinois v. Allen, 397 U.S. 337 (1970); Snyder v. Massachusetts, 291 U.S. 97, 105-06, 108 (1934). Both the Confrontation and Due Process Clauses require a careful assessment of the "competing interests." Rushen v. Spain, 464 U.S. 114, 118 (1983).

B. The Interest of the Defendant in Personal Presence at the Competency Hearing is Miniscule.

The defendant's interest in this case is not the right to presence in the abstract, but the incremental increase in his capacity to assist in his own defense afforded by personal presence in this hearing. In those terms the fair trial interests of the defendant impaired by his exclusion from the hearing are virtually nil. "The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Snyder v. Massachusetts, 291 U.S.

97, 108 (1934)(emphasis added). The complete opportunity for presence and cross-examination afforded at the trial dwarfs and overwhelms any marginal advantage that might accrue from presence at the competency hearing. See State v. Ritchey, 107 Ariz. 552, 555, 490 P.2d 558, 561 (1971). The incremental advantage to the defendant is further reduced by the limited nature of the competency inquiry, by the fact that the determination is a mixed question of law and fact for the trial judge to determine, and by the fact that the defendant's lawyer is present on his behalf, with an opportunity to cross-examine and offer argument to the court. See Moll v. State, 351 N.W.2d 639 (Minn. Ct. App. 1984). In the Gagnon decision this Court emphasized that: "Respondents could have done nothing had they been at the conference, nor would they have gained anything by attending." 470 U.S. at 522. So too, viewed realistically, the defendant's contribution to his own defense at this limited preliminary procedure is so miniscule as to be immeasurable.

C. The Defendant's Confrontation Clause Interests are Fully Protected By the Subsequent Full Confrontation and Cross-Examination at Trial.

This Court held, in California v. Green, 399 U.S. 149 (1970), that the Sixth Amendment's Confrontation Clause was not violated when a witness' out-of-court statement, which had not been subject to cross-examination, was admitted as an exception to the hearsay rule to impeach a presently available witness under examination. In Green this Court noted a split among the states as to whether the prior inconsistent statements should be treated as among the hearsay exceptions, but held that this Court's only function was to determine whether the evidentiary rule permitting admission of the statements denied the right of confrontation. Id. at 155. In reaching the conclusion that the admission of the prior statement did not violate the Sixth Amendment, the Court reasoned that subjecting the witness to cross-examination at the present hearing obviated any prejudice which may have resulted from the

inability to cross-examine when the prior statement was made. Id. at 159.

The holding in Green is dispositive of the outcome of this case. If a prior statement not subject to cross-examination and relevant to an issue on the merits is constitutionally admissible as long as the defendant has the rights of confrontation and cross-examination at the present hearing, then it must automatically follow that the defendant's lack of confrontation during an in-chambers competency hearing in which issues on the merits are not involved does not violate the Sixth Amendment as long as the rights of confrontation and cross-examination are preserved at trial.[1] Put

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[1] Amici do not suggest that confrontation identical to that which occurred in Green is required at trial; they note only that it occurred here. See Commonwealth v. Willis, Ky., 716 S.W.2d 224 (1986).

starkly. Green stands for the proposition that to cross-examine when it counts --at the trial--cures any constitutional objections to the inability to previously cross-examine. In the case of a competency hearing, Green's rationale is far more powerful, for there is absolutely nothing that the defendant could personally contribute on the preliminary issue of whether the child-witness should be heard that the defendant cannot accomplish when the child is heard.

The Green holding cannot be logically distinguished merely on the grounds that the competency hearing is a crucial event in the trial. See Stincer v. Commonwealth, 712 S.W.2d 939, 940-41 (Ky. 1986). The hearing is "crucial" only in the superficial and literal sense that a decision to bar the child's testimony may effectively terminate prosecution. But from the moment of arrest to the exhaustion of final appeal there are many phases in which the defendant is not physically present at which decisions "crucial" to the outcome are made--from the

prosecutor's decision to prosecute to the side-bar conferences of trial judges and attorneys to the jury's deliberations to appellate argument and disposition. The proper question is whether the defendant's physical presence at the stage at issue may meaningfully contribute to his defense--whether he, in short, has anything to offer by his presence more palpable than "a mere shadow." Snyder v. Massachusetts, 291 U.S. 97, 106-07 (1934).

The only issue decided at the competency hearing is whether the child comprehends the difference between truth and falsity, not whether the trier-of-fact will accept the child's version of the truth. At the hearing in this case, no facts concerning the case or testimony were mentioned. (JA 1-11) The defendant simply could not contribute anything to the determination of competency during this hearing. If the defendant could contribute anything beyond what his attorney, who had the right of cross-examination at the competency hearing, could

provide, that contribution could be fully exploited at trial, in front of the jury. Indeed, none of the objectives of the Confrontation Clause identified by this Court in Green are frustrated by the procedure followed by the trial judge in this case. Green stated that confrontation:

> (1) insures that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth;" (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

399 U.S. at 158.

The child-witnesses in this case were fully "impressed with the seriousness of the matter" by the full open-court examination; they were subject to complete cross-examination at trial, and the jury was permitted, in the arena of direct confrontation between accusers and accused, to assess the demeanor and credibility of the child-witnesses. The defendant's presence would clearly have been required if it "could fairly be

assumed to bear, a relation, reasonably substantial," to his "opportunity to defend." Snyder v. Massachusetts, 291 U.S. 97, 106-07 (1934). But nothing in the Constitution "assures the privilges of presence when presence would be useless, or the benefit but a shadow." Id. When it is impossible to even articulate any plausible contribution which the defendant could offer on the narrow issue of the child's understanding of his or her obligation as a witness, as opposed to the child's substantive testimony, the benefit is obviously not "reasonably substantial."

II. THE ACCURACY OF THE TRIAL COURT'S COMPETENCY DETERMINATION IS NOT ENHANCED BY THE DEFENDANT'S PRESENCE.

The second factor in the constitutional calculation is the enhanced accuracy afforded by the additional procedural protection requested by the defendant. The accuracy at issue, however, is not accuracy concerning the merits of the defendant's guilt or innocence, but the accuracy of the trial court's determination on the question

of the child's competence to testify. The question therefore is whether the defendant's presence appreciably increases the judge's ability to determine whether the child comprehends the distinction between truth and falsehood. This is not an inquiry into historical fact, but rather an inquiry into the child's present capability.

If anything, the defendant's presence is likely to detract from the ability of the trial judge to intelligently assess the child's competence. As in Gagnon, presence in this case "could have been counter-productive." 470 U.S. at 522. The potential for trauma and intimidation caused by the defendant's presence may be unavoidable at the later trial in which the child must submit to the crucible of the full criminal trial process, but that potential trauma and intimidation can only interfere with the preliminary determination of whether the child is competent to enter that crucible. See Moll v. State, 351 N.W.2d 639, 644 (Minn. Ct. App. 1984).

In assessing the utility of the defendant's

presence for the accurate resolution of the competency issue, this Court has the benefit of the analysis of a number of lower court decisions which have resolved the competing interests at stake in excluding the defendant from a competency hearing in favor of exclusion.

In People v. Breitweiser, 38 Ill. App. 3d 1066, 1068, 349 N.E.2d 454, 456 (1976), the court emphasized that during the ultimate trial, the "witness may be cross-examined, like any other competent witness to determine that weight and credibility of his testimony. It is here, in open court, that the defendant has the right to confront the witness and probe his capacity for memory and perception." The Arizona Supreme Court has pointed out that a defendant's need to be present at a competency determination is qualitatively different from his need to be present during the trial, because "[t]he determination of the competency of a witness to testify is a matter of law to which legal counsel is specially qualified to address himself." State

v. Ritchey, 107 Ariz. 552, 555, 490 P.2d 558, 561 (1971). In Moll v. State, 351 N.W.2d 639 (Minn. Ct. App. 1984), the court emphasized that the defendant's presence may intimidate the child, but is unlikely to assist the trial judge in determining competency. See also, State v. Taylor, 704 P.2d 443 (N.M. App. 1985).

The state also, of course, has a powerful interest in assuring the defendant a fair trial, an interest in exercising care to ensure that the testimony upon which a conviction is based is competent. Under the Federal Rules of Evidence, and under the evidence rules of a substantial number of states, all witnesses are presumed competent, and no special competency hearings for child witnesses are conducted. See Fed. R. Evid. 601; Intrafamily Child Sexual Abuse Cases: Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases, (ABA Young Lawyers Division), § 4.1 at 30 (1982). In those jurisdictions in which the Federal Rules of Evidence model is followed and all issues

concerning competency are simply introduced as matters of weight and credibility for the triers-of-fact, the defendant actually enjoys less procedural protection than in those states in which separate competency hearings for child witnesses are first held. A preliminary competency hearing gives the defendant two bites at the apple. If the judge rules the child incompetent, the defendant has scored a significant victory. If the child is judged competent, the defendant is in nc worse position than he would be in the complete absence of a competency hearing. If the Constitution does not require that the defendant be given the opportunity of subjecting the witness to a preliminary competency hearing at all, there certainly can be no objection to the state's decision to avoid face-to-face confrontation when such an added procedural protection is given since the full panoply of Sixth Amendment rights remain available at trial.

Preliminary competency determinations by the trial judge for witnesses remain common among the states. See, e.g., Ark. Stat. Ann. § 28-1001, R. 104(a) (1979)(court determines preliminary questions of competency); Pennington v. State, 331 So.2d 411, 413 (Ala. 1976)(pre-testimony voir dire of victim to determine competency); Toney v. Bouthiller, 129 Ariz. 402, 407, 631 P.2d 557, 562 (Ariz. Ct. App. 1981)(trial judge must conduct preliminary voir dire of child to determine competency); State v. Madrid, 74 Idaho 200, 202, 259 P.2d 1044, 1045 (1953)(preliminary competency hearing); People v. Breitweiser, 38 Ill. App. 3d 1066, 1068, 349 N.E.2d 454, 456 (1976)(same); State v. Noble, 90 N.M. 360, 363, 563 P.2d 1153, 1156 (1977)(extensive examination of child victim/witness by judge, prosecutor, and defense counsel outside of presence of jury); State v. Robinson, 310 N.C. 530, 313 S.E.2d 571, 577 (1984)(same); State v. Woodward, 32 Wash. App. 204, 207, 646 P.2d 135, 137 (1982)(trial judge made preliminary finding of child's competency).

III. THE STATE INTEREST IN EXCLUDING THE DEFENDANT IS COMPELLING, IN LIGHT OF THE OVERWHELMING EVIDENCE OF PSYCHOLOGICAL TRAUMA TO THE CHILD CAUSED BY REPEATED CONFRONTATIONS WITH THE OFFENDER

A. The State Has a Powerful Interest in Minimizing Psychological Trauma to the Child Victim of Sex Abuse

The third factor in the constitutional evaluation is the strength of the state interests served by not granting to the defendant the additional procedural protection being demanded.

In competency hearings involving child sexual abuse witnesses, the state has a powerful interest in reducing as much as possible the additional psychological trauma which may accompany participation by the child in the criminal justice process. See Berliner, The Child Witness: The Progress and Emerging Limitatons in ABA Papers from a National Policy Conference on Legal Reforms in Child Abuse Cases 97 (1985).

Eye witnesses and corroborating evidence are extremely rare in sexual abuse cases; the prosecution's case often depends primarily on the

testimony of the allegedly abused child. See Note, Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases 69 Minn. L. Rev. 1377 (1985).

Throughout the entire criminal justice process, the child abuse victim is whipsawed by unique pressures. The defendant in a child abuse case will often be a relative, or a close family friend. One survey of 583 cases revealed that the alleged offender was a family member in 47% of the cases, an acquaintance of the child in 42% of the cases and a complete stranger in only 8%. See Conte & Berliner, Sexual Abuse of Children: Implications for Practice, J. Contemp. Soc. Work 601, 603 (1981). In many instances, family pressures are brought to bear against the child to encourage recanting of the child's version of events; the family may be ambivalent toward pursuing punishment of the perpetrator, wishing instead for the sexual abuse simply to stop. See

Note, The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations, 98 Harv. L. Rev. 806, 807 n.14 (1985), citing E. Weiss & R. Berg, Child Victims of Sexual Assault: Impact of Court Procedures 10-12 (1980). Even when parents are desirous of assisting with criminal prosecution, they will sometimes decline to press charges in order to spare the already abused child the psychological ordeal of protracted litigation in which the painful episodes are incessently repeated and dissected. See Testimony of Child Victims, supra, 98 Harv. L. Rev. at 807.

The additional psychological trauma visited upon the child by courtroom procedures has come to be called the "second victimization." See Selected State Legislation: A Guide for Effective State Laws to Protect Children, National Center for Missing & Exploited Children 19 (1985). See also Parker, The Rights of Child Witnesses: Is the Court A Protector or Perpetrator? 17 New Engl. L. Rev. 643, 647-56 (1982).

As one might expect, social science data indicates that children may differ quite dramatically in their reactions to participation in the criminal process. For some the experience may be desensitizing, or even therapeutic. For others, retelling the story is like a repetition of the original abuse; the testimony is scarring and terrifying. See Melton, Psychological Issues in Child Victim's Interaction with the Legal System, 5 Victimology 274, 275 (1980); Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne L. Rev. 977 (1969); Defendants' Rights in Child Witness Competency Hearings, supra, 69 Minn. L. Rev. at 1384-85. Available social science information indicates that the psychic trauma experienced by the child victim/witness has long-lasting effects. Child incest victims may still manifest psychological disturbancy twenty years later, and "[to] the extent that children have more difficulty making sense of criminal events, they might be expected to show prolonged disturbance."

Goodman, The Child Witness: Conclusions and Future Directions for Research and Legal Practice, 40 J. of Social Issues 157, 167 (1984).

The child's testimony is delivered in a context that is bewildering and frightening. As two experts have noted: "For some children, especially those who have been threatened with death or bodily harm if they tell what happened, terror may better describe their feelings." Goodman & Helgeson, Child Sexual Assault: Children's Memory and the Law, in ABA Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases 41, 53 (1985).

Professional opinion in the field has emphasized that while psychological rehabilitation of the child may not be greviously impaired by a single confrontation with the perpetrator, and may even be enhanced, "repeated confrontations may be damaging." Defendants' Rights in Child Witness Competency Hearings, supra, 69 Minn. L. Rev. at 1390. See also Note, The Young Victim as Witness for the Prosecution: Another Form of Abuse?, 89

Dick. L. Rev. 721 (1975); Comment, The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?, 40 U. of Miami L. R. 245 (1985). In light of the overwhelming scientific evidence of the psychological trauma to the child that may result from the criminal trial, the state's interests are compelling. If the child is judged by the trial court to be incompetent to testify, the exclusion of the defendant will have avoided the damage incident to face-to-face confrontation. If the child is judged competent, the child will of course be forced to endure the stress of confrontation at trial, but the state will at least have reduced that injury by not requiring that it be endured twice.

B. The Strength of the State Interest is Evidenced by a Nationwide Legislative Trend Toward Reforming Procedures in Child Abuse Cases.

In the last several years, the growing awareness of the problem of child sexual abuse, and the corresponding increase in sensitivity to the traumas that the crminal justice system itself

may induce, has resulted in a flurry of state legislation aimed at reducing psychological damage to the child caused by participation as a witness. The states have a powerfully compelling interest in providing the child witness with the maximum psychological shelter consistent with the Constitution. Many of the reforms recently enacted go well beyond the issues posed by the Kentucky procedure followed in this case. It is appropriate for this Court to have a sense of these recent reforms, however, as evidence of the extraordinary importance which the states have attached to their interest in safeguarding the child victim during the criminal justice process. States have relaxed competency criteria for children, created special hearsay exceptions, limited access to spectators, authorized the introduction of videotaped testimony, permitted the taking of testimony via closed circuit television, and allowed introduction of videotaped first statements concerning the alleged child abuse by a non-attorney interviewer. See Eastman &

Bulkley, Protecting Child Victim Witnesses, Sample Laws and Materials (ABA Young Lawyers Division) (1986); Bulkley, Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases, 89 Dick. L. Rev. 645 (1985); Whitcomb, Assisting Child Victims in the Courts: The Practical Side of Legislative Reform in ABA Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases 15-23 (1985).

At least twenty-two states have recently enacted special hearsay statutes for child sexual abuse victims. See, e.g., Alaska, Alaska Stat. § 12.40.110 (1985); Arizona, Ariz. Rev. Stat. Ann. § 13.1416(1985); Arkansas, Ark. R. Evid. 803(25)(A) (1985); California, Cal. Evid. Code § 1228 (West 1985); Colorado, Colo. Rev. Stat. § 13-25-129 (1983); Florida, Fla. Stat. § 90.803 (1985); Illinois, Ill. Ann. Stat. ch. 38, § 115-10 (Smith-Hurd 1984); Indiana, Ind. Code Ann. § 35-37-4-6 (Burns 1985); Iowa, Iowa Code § 232.96(6) (1985); Kansas, Kan. Stat. Ann. §

60-46-(dd) (1983); Maine, Me. Rev. Stat. Ann. tit. 15, § 1205 (1985); Minnesota, Minn. Stat. Ann. § 595.02(3) (West 1984); Missouri, Mo. Rev. Stat. § 491.075 (1985); Nevada, Act of June 12, 1985, Ch. 653, 1985 Nev. Stat. 2132; New York, N.Y. Crim. Proc. Law §§ 65.00 to 65.30 (McKinney 1985); Oklahoma, Okla. Stat. Ann. tit. 12, § 2803.1 (West 1985); Rhode Island, R.I. Gen. Laws § 14-1-68 (1985); South Dakota, S.D. Codified Laws Ann. § 19-16-38 (1985); Texas, Tex. Code Crim. Proc. Ann. art. 38.072 (Vernon 1985); Tex Fam. Code Ann. § 504.031 (Vernon 1985); Utah, Utah Code Ann. § 76-5-411 (1985); Vermont, Vt. R. Evid. 804(a) (1985); Washington, Wash. Rev. Code Ann. § 9A.44.120 (1985).

At least twenty-seven states have recently adopted laws authorizing the introduction of videotaped testimony taken at a deposition or preliminay hearing. See, e.g., Alabama, Act of May 29, 1985, Act No. 85-743, 1984 Ala. Acts; Alaska, Alaska Stat. § 12.45.047 (1984); Arizona, Ariz. Rev. Stat. Ann. § 13-4253 (1985); Arkansas,

Ark. Stat. Ann. §§ 43-2035 to 2037 (1985); California, Cal. Penal Code § 1346 (West 1985); Colorado, Colo, Rev. Stat. § 18-3-413 (1984); Connecticut, Act of July 8, (1985), Pub. Act No. 85-587, 1985 Conn. Legis. Serv. 463 (West); Delaware, Del. Code Ann. tit. 11, § 3511 (1985); Florida, Fla. Stat. § 92.53 (1985); Iowa, Iowa Code § 910A.3 (1985); Kansas, Act of April 9, 1985, Ch. 112, 1985 Kan. Sess. Laws; Kentucky, Ky. Rev. Stat. § 421.350 (1984); Maine, Me. Rev. Stat. Ann. tit. 22, § 1205 (1985); Massachusetts, Mass. Gen. Laws Ann. ch. 278, § 16D (West 1985); Missouri, Mo. Ann. Stat. §§ 491.680 to 491.687 (Vernon 1985); Montana, Mont. Code Ann. §§ 46-15-401 to 403 (1977); Nevada, Act of June 3, 1985, Ch. 462, 1985 Nev. Stat.; New Hampshire, N.H. Rev. Stat. Ann. § 517:13-a (1985); New Mexico, N.M. Stat. Ann. § 30-9-17 (1984); Oklahoma, Okla. Stat. Ann. tit. 22, § 753 (West 1984); Rhode Island, R.I. Gen. Laws § 11-37-13.1 (1985); South Dakota, S.D. Codified Laws Ann. §

23A-12-9 (1985); Tennessee, Tenn. Code Ann. § 24-7-116 (1985); Texas, Tex. Code Crim. Proc. Ann. art. 38.071 (Vernon 1983); Utah, Utah Code Ann. § 77-35-15.5 (1985); Vermont, Vt. R. Evid. 807 (1985); Wisconsin, Wis. Stat. § 967.04(7) (1983). By any measure, the intensity of the state response to this issue is impressive testimony to the strength of the social interests at stake.

In comparison to many of these reforms, the trial court's exclusion of the defendant from the competency hearing was quite modest; the full-dress cross-examination and confrontation rights of the trial itself were in no way modified. If this Court were, at this early juncture, to strike down this minimal, narrowly tailored protection of the child, it would substantially cripple the emerging nationwide effort to evolve an accomodation between the rights of the accused and the psychological health of the child victim.

C. This Court has Already Acknowledged that the State has a Compelling Interest in Protecting the Child Sex Abuse Witness, and the Kentucky Procedure is Narrowly Tailored to Effectuate that Interest.

This Court has already held that the state "interest . . . in safeguarding the physical and psychological well-being of a minor . . . is a compelling one." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982). In Globe Newspaper this Court instructed that the compelling interest in safeguarding the child must be balanced on a case-by-case basis against the First Amenmdment interests in public access to criminal trials, and the Sixth Amendment right to a public trial. Id. at 604-10. This Court has placed an exceptionally high constitutional value on the presumptive openness of criminal trials. See, e.g., Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Waller v. Georgia, 467 U.S. 39 (1984); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

The First Amendment qualified right of access to criminal proceedings is, of course, not

directly implicated by the Kentucky procedure followed in this case, since neither the press nor any member of the public was claiming any right to attend the competency hearing in chambers. The First Amendment right of access cases are also, however, grounded in the Sixth Amendment right to a public trial, rights which extend to such aspects of the trial as jury selection, Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984), and pre-trial suppression hearings, Waller v. Georgia, 467 U.S. 39 (1984).

This line of press-access cases, however, has absolutely no applicability to the type of brief, in-chambers competency examination at issue in this case. In Waller, this Court emphasized that "a suppression hearing often resembles a bench trial: witnesses are sworn and testify, and of course counsel argue their positions. . . . [a] challenge to the seizure of evidence frequently attacks the police and prosecutor." 467 U.S. at 47. The public interest in the criminal trial in a child sex abuse case is fully protected under

the procedure followed by the Kentucky trial court, because every aspect of the trial, including the child's testimony on the merits, is fully open. Similarly, the Sixth Amendment right of the accused to a public trial is fully preserved by this procedure. Because the competency hearing determines only the limited question of whether the child will testify at all, the narrowly tailored exclusion of the accused is certainly a defensible accommodation of the compelling interest in sheltering the child, recognized by this Court in Globe, and the First Amendment and Sixth Amendment rights to a public trial, which remain completely undiminished when the child testifies in open court.

CONCLUSION

For the foregoing reasons, Amici, the State of Arkansas and sister states, respectfully urge this Court to reverse the judgment of the Supreme Court of Kentucky.

Respectfully submitted,

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January 22, 1987

AMICUS CURIAE

BRIEF

(1) COPY

No. 86-572

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

FILED
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COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

SERGIO STINCER,
Respondent.

On Writ of Certiorari to the
Supreme Court of Kentucky

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF

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44 pp

TABLE OF CONTENTS

	PAGES
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF	iv-viii
BRIEF OF AMICUS CURIAE	1
INTEREST OF AMICUS CURIAE	2-3
SUMMARY OF ARGUMENT	3-4
ARGUMENT	4-20
CONCLUSION	20-22

TABLE OF AUTHORITIES CITED

UNITED STATES SUPREME COURT CASES: Pages

California v. Green, 399 U.S. 149 (1970) 13, 14, 19

Douglas v. Alabama; 380 U.S. 415 (1965) 14, 15, 16

Globe Newspaper Co. v. Superior Court, 457 U.S. 598 (1982) 34

Mattox v. United States, 156 U.S. 237 (1895) 15, 16, 23, 24, 26, 28, 29

Snyder v. Massachusetts, 291 U.S. 97 (1934) 21

OTHER FEDERAL CASES:

Stegall v. United States, 153 F.Supp. 844 (W.D. Ky. 1957) 22

United States v. Benfield, 593 F.2d 815 (8th Cir. 1979) 16, 17, 18, 20

United States v. Gore, 130 F.Supp. 117 (W.D. Ky. 1955) 21

United States v. Gunter, 631 F.2d 583 (8th Cir. 1980) 21

United States v. Heinlein, 490 F.2d 725 (D.C. Cir. 1973) 10

United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980) 33

United States v. Lewis, 420 F.2d 686, (5th Cir. 1970) 21

United States v. Nick, 604 F.2d 1199 (9th Cir. 1979) 33

United States v. Sinclair, 438 F.2d 50 (5th Cir. 1970) 21

United States v. Tannuzzo, 174 F.2d 177 (2d Cir. 1949) 10

STATE CASES:

Herbert v. Superior Court, 117 Cal.App.3d 661 (1981) 17, 18, 20

Hubbard v. Haynes, 189 Tenn. 335, 225 S.W.2d 252 (1949) 8

Kansas City v. McCox, 525 S.W.2d 336 (1975). 29

People v. Breitweiser, 38 Ill.App.3d 1066, 349 N.E.2d 454 (1976) 10, 11, 21

People v. Medley, 44 Ill.App.3d 878, 3 Ill.Dec. 408, 358 N.E.2d 951 (1977) 22

People v. Pierce, 56 Ill.2d 361, 308 N.E.2d 577 (1974) 22

People v. Robinson, 73 Ill.2d 192, 22 Ill.Dec. 688, 383 N.E.2d 164 (1978) 10

People v. Saltz, 75 Ill.App.3d 477, 30 Ill.Dec. 945, 393 N.E.2d 1292 (1979) 22

State v. Melendez, 135 Ariz. 390, 661 P.2d 654 (1982) 29

State v. Reid, 114 Ariz. 16, 559 P.2d 136, cert. den. 431 U.S. 921 (1976) 29

State v. Ritchey, 107 Ariz. 552, 490 P.2d 558 (1971) 10, 20

Stincer v. Commonwealth, 712 S.W.2d 939 (1986) 6

STATUTORY PROVISIONS AND RULES OF COURT:

Ariz.Rev.Stat. Ann. §12-2312 (1982) 33

Ark.Stat. Ann. § 43-2036 33

Cal.Evid. Code § 700 32

Cal.Evid. Code § 765(b) 31

Cal.Evid. Code § 767(b) 31

Cal.Pen. Code § 861.5 32

Cal.Pen. Code § 868.5 31

Cal.Pen. Code § 868.8 32

Cal.Pen. Code § 1346 30

Cal.Pen. Code § 1347 30

Cal.Pen. Code § 1348.5 31

Colo.Rev.Stat. § 18-3-413 33

Fla.Stat. Ann. § 918.17 . 33

Mont. Code Ann. § 46-15-401,402,403..... 33

Mont. Code Ann. § 46-15-402 33

N.M.Stat. Ann. § 30-9-17 33

Tex.Crim.Proc. Ann. Art. 38.071 33

Utah Code Ann. § 76-5-410 32

Wash. Rev. Code Ann. § 9A.44.120 32

No. 86-572

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

COMMONWEALTH OF KENTUCKY
Petitioner,

v.

SERGIO STINCER,
Respondent.

On Writ of Certiorari to the
Supreme Court of Kentucky

MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

The Appellate Committee of the District Attorneys Association of California hereby respectfully moves for leave to file the attached brief of amicus curiae in this case. The consent of the attorneys for petitioner and respondent has been obtained.

The Appellate Committee of the California District Attorneys Association is a committee created by the district attorneys of California to utilize and coordinate the resources of district attorneys' offices throughout the state, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have a major statewide impact upon the prosecution of criminal offenses. Upon review of the instant matter, the Committee has concluded that the outcome of this case will have a substantial impact upon the administration of criminal justice throughout California should this Court hold that a defendant has a constitutional right to attend a pretrial hearing to determine the competency of child sexual abuse victims. Accordingly, the Committee has decided to

seek permission to file an amicus curiae brief herein. The Office of the District Attorney of the County of Los Angeles has been requested to prepare and submit this brief. The District Attorney of the County of Los Angeles is an authorized law officer of the county, which is a political subdivision of the State of California. (See Rule 36.4.)

In the instant case the Supreme Court of Kentucky has held that the Sixth Amendment right of confrontation includes the right of a defendant to be present at a preliminary pretrial hearing to determine whether child victims of defendant's sexual abuse are competent to testify. That court's holding that child sexual abuse victims are "witnesses" within the meaning of the Sixth Amendment prior to their being found to be competent is erroneous, as is the court's conclusion that

competency hearings are a crucial part of a trial. It appears that neither petitioner nor respondent has thus far raised the contention that child abuse victims are not "witnesses" within the meaning of the Sixth Amendment until they have been deemed competent to testify by the trial court. Hence it is submitted that the brief of amicus will be helpful to this court.

For the foregoing reasons, our motion for leave to file the attached amicus curiae brief should be granted.

Respectfully submitted
on behalf of the Appellate
Committee of the California
District Attorneys Association
IRA REINER
District Attorney of
Los Angeles County
By Harry B. Sondheim
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No. 86-572

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

COMMONWEALTH OF KENTUCKY
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SERGIO STINCER,
Respondent.

On Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF OF AMICUS CURIAE

Amicus Curiae, Appellate Committee of the California District Attorneys Association and Ira Reiner, District Attorney of Los Angeles County, submit this brief accompanied by motion for leave to file the same, pursuant to Rule 36.3.

INTEREST OF AMICUS CURIAE

The Appellate Committee of the California District Attorneys Association is a committee created by the district attorneys of California to utilize and coordinate the resources of district attorneys offices throughout the state, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal offenses. Upon review of the instant matter, the Committee has concluded that the outcome of this case will have substantial impact upon the administration of criminal justice throughout California should this Court hold that a defendant has a constitutional right to be present at a preliminary pretrial hearing to determine whether child sexual abuse victims are competent to testify at trial.

Accordingly, the Committee has decided to seek permission to file an amicus curiae brief herein. The Office of the District Attorney of the County of Los Angeles has been requested to prepare and submit this brief. The District Attorney of the County of Los Angeles is an authorized law officer of the county, which is a political subdivision of the State of California. (See Rule 36.4.)

SUMMARY OF ARGUMENT

Our argument is that the Kentucky Supreme Court has erroneously understood the Sixth Amendment right of confrontation as entailing the right of a defendant to be present at a preliminary pretrial hearing to determine whether child sexual abuse victims are competent to testify at trial. This misinterpretation of the Sixth Amendment rests upon a misunderstanding of the meaning

of the word "witness" in the confrontation clause of the Sixth Amendment and misconstrues the purpose and function of competency hearings.

ARGUMENT

I

THE SIXTH AMENDMENT RIGHT OF CONFRONTATION DOES NOT INCLUDE THE RIGHT OF A DEFENDANT TO BE PRESENT AT PRELIMINARY PRETRIAL HEARINGS TO DETERMINE WHETHER CHILD SEXUAL ABUSE VICTIMS ARE COMPETENT TO TESTIFY AT TRIAL.

In the instant case, defendant was charged with sexual offenses involving three children. Prior to trial, the trial judge held a preliminary hearing in chambers to consider the competency of the child witnesses. The children were questioned as to background facts, such as

their birthdays and names of their school, Sunday school and teachers. Each was then questioned as to the difference between the truth and a lie, the consequences of not telling the truth, and each promised to tell the truth. No facts of the case or testimony was mentioned. Defense counsel was permitted to cross-examine each child.

Prior to the competency hearings, respondent and his counsel requested that respondent be present during those hearings. The request was denied.

On direct appeal to the Supreme Court of Kentucky, that court concluded that the trial court erred in excluding respondent from the competency hearing, and found that such error was reversible per se.

The Kentucky Supreme Court concluded that the trial court erred in excluding respondent from the competency

hearing because it found that the competency hearing was a "crucial phase of the trial", because "The determination of whether the child witnesses could testify was critical to the prosecution's case, as their testimony comprised the gravamen of the charges against appellant Stincer". (Stincer v. Commonwealth 712 S.W. 2d 939, 940 (1986).) The opinion of the Kentucky high court discloses that that court reached its conclusion because it considered the child sexual abuse victims "witnesses" against respondent within the meaning of the Sixth Amendment even prior to their being deemed competent, and because it considered the competency hearing to be a crucial part of the trial.

Contrary to the Kentucky high court's position, we submit that the child sexual abuse victims were not "witnesses" against respondent within the meaning of

the confrontation clause of the Sixth Amendment until they were found to be competent to testify at trial by the trial court. We further submit that the instant competency hearing was not part of the trial.

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A.

AT THE COMPETENCY HEARING, THE CHILDREN WERE NOT "WITNESSES" AGAINST RESPONDENT WITHIN THE MEANING OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT; NOR WAS THE COMPETENCY HEARING A PART OF THE TRIAL.

"'Witness' is likely to be an ambiguous word, the meaning of which 'is to be determined in each case by the attendant circumstances and context, and . . . there is no safe general rule that can be applied universally.'" (United States v. Minker, 217 F.2d 350, 351 (3d Cir. 1954), quoting from Hubbard v. Haynes (1949) 189 Tenn. 335, 225 S.W.2d 252.) We submit that until a person testifies as to matters which pertain to the accused's guilt or innocence, at the trial of the matter of the accused's guilt or innocence, in front of the trier of fact, that person is not a "witness" within the

meaning of the Confrontation Clause of the Sixth Amendment. In the case at bar, it does not appear that any oath was given to the children prior to their examination for competency. The hearing was not held inside the courtroom, but rather was held, somewhat informally in the trial judge's chambers. The child victims discussed no matters that bore on the issue of respondent's guilt or innocence. Respondent could suffer no detriment at his trial by virtue of the statements of the children taken at the competency hearing. Unlike the examination of witnesses at trial, the very purpose of a competency hearing is to determine whether the person in question will be able to be a witness against the accused. Inherent in any objection based on the competency of the proposed witness is the assertion that that person is not, and cannot be a witness until the trial judge finds him or her competent to testify.

Unlike the testimony of witnesses heard by the trier of fact for the purpose

EDITOR'S NOTE

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of deciding guilt or innocence, the statements of the child witnesses at the competency hearing were heard solely by the trial judge for the purpose of determining a threshold question of law which lies exclusively in the trial court's discretion. (See United States v. Heinlein 490 F.2d 725 (D.C. Cir. 1973); United States v. Comer 421 F.2d 1149 (D.C. Cir. 1970); United States v. Tannuzzo 174 F.2d 177 (2d Cir. 1949), cert. den. 338 U.S. 815, 70 S.Ct. 233, 94 L.Ed. 551.)

Although not expressly decided on this rationale, State v. Ritchey(1971) 107 Ariz. 552, 490 P.2d 558 and People v. Breitweiser (1976) 38 Ill.App.3d 1066, 349 N.E.2d 454 (disapproved on other grounds in People v. Robinson (1978) 73 Ill.2d 192, 22 Ill.Dec. 688, 383 N.E.2d 164) upholds the principle that child abuse victims testifying at competency hearings are not "witnesses" within the meaning of the Confrontation Clause of the Sixth Amendment. In Ritchey supra, it was held permissible to examine

the competency of a seven-year-old child abuse victim in the judge's chambers in the absence of the defendant, but in the presence of defendant's attorney because no personal constitutional right of the defendant was at stake at the competency hearing. The court stated at p. 561:

> "We do not find the same compelling need for a defendant to be present at such a proceeding as we find when a personal constitutional right, such as trial by jury, is at stake. Here, a defendant's attorney can adequately exercise the defendant's rights. The determination of the competency of a witness to testify is a matter of law to which legal counsel is specially qualified to address himself. The defendant cannot show that he was prejudiced by the procedure employed herein."

In Breitweiser, supra, it was held that the defendant's right to be present at

all critical stages of his trial was not violated when a pretrial in camera hearing was held, after the defendant had been ordered to leave chambers, to determine whether or not the seven year-old complainant was competent to testify. The court held that the purpose of the hearing was not, as defendant suggested, to cross-examine the witness so that his perception and memory could be evaluated, and that the defendant's right to confront and cross-examine the witness was fully exercised subsequently in open court after the threshold issue of competency had been resolved. The court held that none of the defendant's constitutional or other substantial rights were at stake at the hearing and that his presence had therefore not been required.

From the foregoing facts and authorities it should be clear that the competency hearing held in the instant case was not a part of the trial of the matter of

respondent's guilt or innocence, and the children were not "witnesses" against respondent within the meaning of the Confrontation Clause of the Sixth Amendment. The Kentucky Supreme Court erred in holding otherwise.

B.

THE PURPOSES UNDERLYING THE CONFRONTATION CLAUSE WERE SATISFIED BY ALLOWING RESPONDENT'S COUNSEL TO CROSS-EXAMINE THE CHILDREN AT THE COMPETENCY HEARING.

In California v. Green (1970) 399 U.S. 149, 158, 26 L.Ed.2d 489, 497, 90 S.Ct. 1930, the United States Supreme Court listed the purposes of the Confrontation Clause:

> "Confrontation: (1) insures that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the

lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility. (Footnote omitted.)

The Green court did not say that the Confrontation Clause serves any purpose of allowing the defendant to physically confront his accusers in a face-to-face setting. Indeed, the United States Supreme Court has indicated that such physical confrontation is not an indispensable element of the right of confrontation. In Douglas v.

Alabama (1965) 380 U.S. 415, 418, 13 L.Ed.2d 934, 937, 85 S.Ct. 1074, the Court observed that in previous cases it had held "that a primary interest secured by [the Confrontation Clause] is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." The Douglas court observed that in Mattox v. United States (1895) 156 U.S. 237, 242-243, 39 L.Ed. 409, 411, 15 S.Ct. 337, it had stated:

"The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of test-

ing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (Douglas v. Alabama, supra, 380 U.S. at 418-419, 13 L.Ed.2d at 937.)

The above passage from Mattox indicates that the primary concerns underlying the Confrontation Clause are that the defendant should have the opportunity to cross-examine his accuser, and that the jury should be able to observe the witness' demeanor while testifying so that it may better judge the witness'credibility.

Nevertheless, in United States v. Benfield (8th Cir. 1979) 593 F.2d. 815, 821,

the United States Court of Appeals held that the Confrontation Clause encompasses the defendant's right to view his accuser face-to-face while the witness is testifying:

> "Basically the confrontation clause contemplates the active participation of the accused at all stages of the trial, including the face-to-face meeting with the witness at trial or, at the minimum, in a deposition allowing the accused to face the witness, assist his counsel, and participate in the questioning through his counsel."

The Benfield court reasoned that "[m]ost believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge." (Ibid.)

In Herbert v. Superior Court (1981)

117 Cal.App.3d 661, the California Court of Appeal found Benfield to be persuasive. The Herbert Court held that the defendant had been denied the right of confrontation when, during the preliminary examination, a child witness and the defendant were so seated that they could not see each other. The court reasoned:

> "The historical concept of the right of confrontation has included the right to see one's accusers face-to-face, thereby giving the fact-finder the opportunity of weighing the demeanor of the accused [sic- should be "accuser"] when forced to make his or her accusation before the one person who knows if the witness is truthful. A witness' reluctance to face the accused may be the product of fabrication rather than fear or

> embarrassment." (Id. at 671.)

In order to determine whether respondent's right of confrontation was violated by respondent's exclusion from the competency hearing herein, it is necessary to ascertain if the purposes underlying the Confrontation Clause were nonetheless satisfied. As stated in Green, supra, the first purpose is to insure that the witness will give his statement under oath. This purpose has no application to a competency hearing, because an oath is not administered; the very purpose of such a hearing is to determine whether the witness is capable of understanding the duty to tell the truth embodied in the oath to be given if the witness is deemed competent.

The second purpose is to force the witness to submit to cross-examination. Respondent had a full opportunity to cross-examine the child witnesses at the competency

hearing through his attorney who was present. Accordingly, the hearing fully satisfied the second purpose.

The third purpose, to permit the jury to observe the witness' demeanor while testifying so that it will be better able to judge his credibility, has no application to the instant competency hearing which was held outside the presence of the jury.

If one accepts the holding of Benfield and Herbert that a fourth purpose of the right of confrontation is to enable the defendant to physically confront his accusers face-to-face, this purpose must be considered in light of the distinguishing features of a competency hearing compared to a trial by jury, and must be weighed against the unique policy considerations concerning child sexual abuse victims which justify the elimination of the face-to-face requirement. (See Ritchey, supra,

and Breitweiser, supra.)

In situations analogous to the competency hearing herein, where defendant's substantial rights were not involved or his presence was useless, numerous courts have held that he need not be present. (Snyder v. Massachusetts 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934) [jury view of the crime scene]; U.S. v. Gunter 631 F.2d 583 (8th Cir. 1980) [in chambers proceeding involving the examination of witnesses to discuss additional prosecution identification evidence]; U.S. v. Lewis 420 F.2d 686 (5th Cir. 1970) [chambers discussion of an evidentiary issue]; U.S. v. Sinclair 438 F.2d 50 (5th Cir. 1970) [chambers discussion of an evidentiary issue]; U.S. v. Gore 130 F.Supp. 117 (W.D. Ky. 1955), affd. 234 F.2d 658 (6th Cir. 1956),cert. den. 352 U.S. 982, 77 S.Ct. 384, 1 L.Ed. 2d 365 [chambers proceeding, argument heard relating to the admission of testimony; trial judge examined

a confederate concerning the circumstances of his confession.]; Stegall v. United States 153 F. Supp. 844 (W.D. Ky. 1957), affd. 259 F.2d 83 (6th Cir. 1958), cert. den. 358 U.S. 886, 3 L.Ed.2d 114, 79 S.Ct. 128 [examination of codefendant concerning the circumstances under which a confession was made]; People v. Saltz (1979) 75 Ill. App.3d 477, 479-80, 30 Ill. Dec. 945, 393 N.E.2d 1292 [presentation of defense counsel's argument on a motion for mistrial and examination of jurors as to whether they read a particular newspaper]; People v. Pierce (1974) 56 Ill.2d 361, 365, 308 N.E.2d 577 [consideration of jury's request to review certain testimony]; People v. Ellis (1980) 81 Ill.App.3d 351, 353, 36 Ill.Dec. 601, 401 N.E.2d 282 [hearing on a motion to vacate a guilty plea]; People v. Medley (1977) 44 Ill.App.3d 878, 3 Ill.Dec. 408, 358 N.E.2d 951, 953 [hearing on defense

motion in limine to limit cross-examination of defendant to defendant's height.].)

The above authorities compel the conclusion that the procedures adopted at the competency hearing herein, namely the presence of respondent's counsel at said hearing and counsel's ability to cross-examine the children, adequately satisfied the purposes of the Confrontation Clause of the Sixth Amendment. Face-to-face confrontation by respondent was not required.

In view of the compelling justification for excluding defendant from the competency hearing herein, namely, the minimizing of the trauma of testifying upon the child victims, we submit that such exclusion should be permitted even if it would infringe upon the exercise of respondent's Sixth Amendment rights. Mattox v. United States, supra, supports our position.

In Mattox the defendant contended that the trial court had violated his constitutional right of confrontation by admitting into evidence the testimony of two deceased witnesses who had testified at a former trial, during which the defendant had had the opportunity to fully cross-examine them. The defendant had been convicted at the former trial, but the conviction was reversed on appeal.

In Mattox the United States Supreme Court observed that the admission of the deceased witnesses' testimony had deprived the defendant of an important safeguard provided by the Confrontation Clause - "compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (Id., 156 U.S. at 242-243, 39 L.Ed. at 411.) Nevertheless, the Court held

that the testimony had been properly admitted.

The Court observed that "[t]here is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness." (Id., 156 U.S. at 243, 39 L.Ed. at 411.) But the Court concluded that, under the circumstances of the case before it, the enforcement of these safeguards must yield in favor of considerations of public policy and fairness:

> "[G]eneral rules of law of this kind, however beneficial in their operation and valuable to the accused, must oocasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because

death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused. [¶]. . . A technical adherence to the letter of a constitutional provision may occasionally be carried further than is necesary to the just protection of the accused, and further than the safety of the public will warrant." (Ibid.)

The Mattox Court noted that the admission of dying declarations was an example of a situation where considerations of public policy had been permitted to prevail over the safeguards

afforded by the Confrontation Clause:

"[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the

necessities of the case, and to prevent a manifest failure of justice. (Id., 156 U.S. at 243-244, 39 L.Ed. at 411.)

In permitting the admission of the former testimony of a deceased witness and in sanctioning the admission of dying declarations, the Mattox court engaged in a weighing process. The Court balanced society's interest in admitting such testimony against the resulting infringement of the defendant's confrontation safeguards if such testimony were admitted. The Court determined that society's interest in admitting the testimony substantially outweighed the defendant's interest in excluding it. Accordingly, the Court concluded that society's interest must prevail.

The balancing of interests approach has been utilized in three state court decisions which held that the

defendants' Sixth Amendment rights had not been violated. (Kansas City v. McCoy (1975) 525 S.W.2d 336 [expert witness gave testimony via closed circuit television]; State v. Reid (1976) 114 Ariz. 16, 559 P.2d 136, cert. den. 431 U.S. 921, 97 S.Ct. 2191, 53.L.Ed.2d 234 (1977) [videotaped testimony of a pathologist admitted at trial] State v. Melendez (1982) 135 Ariz. 390, 661 P.2d 654, 656-67 [videotaped testimony of child molest victim admitted at trial.])

If the exclusion of respondent from the competency hearing in the case at bar violates the letter of respondent's constitutional right of confrontation, that violation is overshadowed by society's interest in minimizing the trauma of the courtroom to child sexual abuse victims. Just as in Mattox, the interest of society should prevail.

Learned commentators and experts have concluded that the experience of

testifying in court is traumatizing for a child, particularly where that testimony concerns sexual abuse. (David R. Wise, Constitutionality of Admitting The Videotape Testimony At Trial of Sexually Abused Children, 7 Whittier Law Review 639 (1985) and authorities cited therein.) In an effort to alleviate the burdens upon young sexual abuse victims produced by the taking of their testimony, various state legislatures have taken steps to assist in procuring the testimony of such minors. California is in the forefront of such legislation. (See Cal. Penal Code section 1346 [permits videotaping of child sexual abuse victim's preliminary hearing testimony and the introduction of the videotape at trial if further testimony would cause the victim emotional trauma]; Cal. Penal Code section 1347 [permits the taking of preliminary hearing or trial testimony of child sexual

abuse victims by means of two-way closed-circuit television, under certain circumstances]; Cal. Penal Code section 1348.5 [court may appoint a "child representative" to represent the interest of the minor child abuse victim throughout all proceedings]; Cal. Evidence Code section 765(b) [the court must take special care to protect a child witness from undue harassment or embarrassment]; Cal. Ev. Code section 767(b) [the right to use leading questions when examining child molest victims]; Cal.Ev. Code section 1228 [the right to use hearsay under certain circumstances to establish the elements of the crime in order to admit the confession of a person charged with child molest]; Cal. P.C. section 868.5 [sexual crime victims under 16 years of age are permitted to have two family members present at a preliminary hearing, one of whom may be a witness; One of those persons may also

accompany the victim to the stand.]; Cal. P.C. section 861.5 [authorizes a magistrate to postpone a preliminary hearing to accomodate the special physical, mental or emotional needs of a child witness under 10 years of age.]; Cal. P.C. section 868.8 [provides that in any criminal proceeding in which the defendant is charged with committing specified crimes involving a minor under the age of 11, the court shall take special precautions to lessen the trauma of the trial process for child witnesses. See also Evidence Code section 700, as amended.])

Other states have comparable statutes. (See, e.g. Wash. Rev. Code Ann. §9A.44.120 [hearsay statement]; Utah Code Ann. §76-5-410 [child sexual abuse victims shall be considered competent witnesses]; Ariz. Rev. Stat. Ann §13-4252, §4253 [recording, videotaping, and closed circuit televising of minor witness permissible

N.M. State. Ann. §30-9-17 [videotaped deposition of minor sexual assault victim permissible and videotape admissible at trial]; Fla. Stat. Ann. §90.90 [videotaping of testimony of child sexual abuse victim permissible and videotape admissible at trial]; Ark. Stat. Ann §43-2036; Colo. Rev. Stat. §18-3-413; Mont. Code Ann. §§46-15-401, 402, 403; Tex. Crim. Pro. Ann. Art. 38.071.

As noted in Wise, supra, the rights of sexually abused children were given special consideration by federal circuit courts in U.S. v. Nick 604 F.2d 1199 (9th Cir. 1979) and in U.S. v. Iron Shell 633 F.2d 77 (8th Cir. 1980), cert. den., 450 U.S. 1001 (1980). These cases involved convictions for child molestation secured in large part on the admission of statements of

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each child. In holding that defendants' rights to confrontation had not been violated, the Nick court emphasized that the child was so young that he could not "appreciate the implications of the assault." (Id at p. 1204.) In Iron Shell, the court was concerned that a trial appearance would overwhelm the young victim. (Id. at p. 87.)

The Supreme Court in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 102 S.Ct. 2613, 73L.Ed. 2d. 248 (1982) recogniz the need to protect the rights of child victims. Globe sought relief from a Massachusetts' trial court ruling made pursuant to a state statute. This statute prohibited the press and general public from the courtroom during any trial of an alleged sexual assault against a minor. Globe asserted that denial of courtroom access constituted a deprivation of its First Amendment right of access to criminal trials. The Supreme Court found

that "the protection of minor victims of sex crimes from further trauma" was a compelling interest, but finally held the statute unconstitutional since it provided for mandatory and total exclusion.

CONCLUSION

For the foregoing reasons, amicus submits that the decision of the Kentucky Supreme Court allowing respondent to be present at the preliminary pretrial hearing to determine the competency of the child victims he sexually molested be reversed. Sensitivity to the constitutional rights of persons accused of crime should not wipe out concern for the legitimate interests of child victims of sexual offenses in minimizing the potential for intimidation, fright and embarrassment caused by the in-court confrontation with the accused. The Kentucky high court's erroneous conclusion that the competency hearing herein was a crucial part

of the trial flies in the face of the nature, purpose, and content of that hearing, and the fact that no useful purpose can be served by allowing respondent to be present thereat. The Kentucky Supreme Court gave only lip-service, as it were, to the special needs of child molest victims who testify in court. We urge that by giving recognition to those needs and reversing the Kentucky high court's judgment, this Court will send a signal throughout the land that the rights of all defendants who stand accused of molesting children can be adequately protected by the judicial system without subjecting those child victims to unnecessary and potentially devastating confrontations with the accused molestors at competency hearings.

Respectfully submitted on
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AMICUS CURIAE

BRIEF

(8)

Supreme Court, U.S.
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No. 86-572

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

COMMONWEALTH OF KENTUCKY,

Petitioner,

v.

SERGIO STINCER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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48 pp

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Interest of *Amicus Curiae* . . .	viii
Summary of Argument	x
Argument:	
I: THE SUPREME COURT OF KENTUCKY CORRECTLY CONSTRUED THE SCOPE AND APPLICATION OF THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE TO REQUIRE THE DEFENDANT'S PRESENCE AT THE COMPETENCY HEARING OF THE CHILD WITNESSES	**1**
A. The Confrontation Clause Guarantees The Right to be Present At Any Stage of the Trial Proceedings When Witnesses are Testifying .	**1**
B. A Hearing to Determine the Competency of Witnesses to Testify at Trial is a Stage of the Trial Proceedings. The Protection of the Confrontation Clause of the Sixth Amendment Therefore Extends to Such a Hearing	**6**
1. The Determination of the Competency of a Witness is a Factual Determination	7

Table of Contents (Continued)

	Page
2. *The Determination of the Competency of a Child Witness Requires a Factual Finding that the Child can Separate the Truth from Fiction*	11
II: **BECAUSE THERE IS NO EVIDENCE THAT THIS DEFENDANT'S PRESENCE AT THE COMPETENCY HEARING WOULD HAVE HAD AN ADVERSE EFFECT ON THE CHILD WITNESSES, NO FOUNDATION EXISTS ON WHICH TO BASE A DENIAL OF THIS DEFENDANT'S RIGHT TO CONFRONTATION** . .	19
CONCLUSION	31

TABLE OF AUTHORITIES

CASES:	Page
Barber v. Page, 390 U.S. 719 (1968)	xi, 8
California v. Green, 399 U.S. 149 (1970)	4, 18
Capps v. Commonwealth, 560 S.W.2d 559 (Ky. 1977)	12
Chambers v. Mississippi, 410 U.S. 284 (1973)	3, 21
Douglas v. Alabama, 380 U.S. 415 (1965)	19
Dutton v. Evans, 400 U.S. 74 (1970)	4
Faretta v. California, 422 U.S. 806 (1975)	2
Globe Newspaper Company v. Superior Court, 457 U.S. 596 (1982)	24
Hochheiser v. Superior Court, 161 Cal.App.3d 777, 208 Cal.Rptr. 273 (modified) 162 Cal.App.3d 517a, 208 Cal.Rptr. 273 (1984)	24
Illinois v. Allen, 397 U.S. 337 (1970)	xii, 6, 15
Kirby v. Illinois, 406 U.S. 682 (1972)	xi, 3

Table of Authorities (Continued)

	Page
Lee v. Illinois, 106 S. Ct. 2056 (1986)	5, 6
Long v. State, 694 S.W.2d 185 (Tx. App. 5th Dist. 1985)	25
Mattox v. United States, 156 U.S. 237 (1895)	xiii, 6, 20
Moll v. State, 351 N.W.2d 639 (Minn. App. 1984)	11, 28
Ohio v. Roberts, 448 U.S. 56 (1980)	xii, 5 15
People v. Breitweiser, 38 Ill.App.3d 1066, 349 N.E.2d 454 (1976)	28
Pointer v. Texas, 380 U.S. 400 (1965)	xiii, 1, 20
Roe v. Wade, 410 U.S. 113 (1973)	20
Snyder v. Massachusetts, 291 U.S. 97 (1934)	x, 1, 9, 15
State v. Braggs, 604 S.W.2d 883 (Tenn. Ct. App. 1980). . .	10
State v. Harris, 107 Ariz. 41, 481 P.2d 504 (1971). . . .	10
State v. Segerberg, 131 Conn. 546, 41 A.2d 101 (1945)	29

Table of Authorities (Continued)

	Page
Stephenson v. Superior Court, 91 Cal.App.3d 925, 154 Cal.Rptr. 476 (1979)	10
Tennessee v. Street, 471 U.S. 409 (1985)	xv, 4, 11
United States v. Ashe, 478 F.2d 661 (D.C. Cir. 1973). . .	10
United States v. Benfield, 593 F.2d 815 (8th Cir. 1979)	16
United States v. Gagnon, 470 U.S. 522 (1985)	2, 3
CONSTITUTIONAL AMENDMENTS:	
U.S. Const. Amend. VI	*passim*
U.S. Const. Amend. XIV	xi, 2, 3, 4
RULES:	
Fed.R.Evid. 104(a)	8
Fed.R.Evid. 104 Advisory Committee Note	8

Table of Authorities (Continued)

Page

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Table of Authorities (Continued)

Page

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Weinstein, J. and Berger, M., *Weinstein's Evidence*, §800[01] (1979) 15

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a nation-wide membership of more than 4,000 lawyers. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its

practices and procedures. A cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional protection of an individual's sixth amendment right to confrontation of witnesses. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee, as would adoption of the position taken by the petitioner in the instant case.

The *Amicus Curiae* Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers and criminal defendants throughout the nation that NACDL should offer its assistance to the Court. Both the petitioner and the respondent have consented to NACDL's participation as *amicus curiae*, and letters of consent have been filed with this Court.

SUMMARY OF ARGUMENT

The Supreme Court of Kentucky correctly held that the sixth amendment's confrontation clause required the defendant's presence at the competency hearing of the child witnesses. Although a determination of the competency of a witness may be held during the trial or before the trial, such a hearing, held at any time, is a proceeding when witnesses are being questioned, triggering the defendant's rights under the sixth amendment's confrontation clause. This Court consistently has held that the sixth amendment requires the defendant's presence at all stages of the proceedings when witnesses are testifying. *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

A competency determination requires the trial court to receive evidence and make factual findings

regarding the witness's ability to understand the requirements of testifying under oath. Because the competency hearing involved factual findings, the confrontation right applied in this case. This right included the opportunity to cross-examine the witnesses and the opportunity for the fact-finder to weigh the demeanor of the witnesses in the presence of the defendant. *Barber v. Page*, 340 U.S. 719 (1968). Furthermore, the competency hearing was a critical stage of the trial and the defendant, therefore, had a right to be present under the due process clause of the fourteenth amendment. *Kirby v. Illinois*, 406 U.S. 682 (1972).

In determining whether a child is a competent witness, the trial court also must make a factual finding that the child can separate the truth from fiction. A child is more susceptible to

suggestion than an adult and has a greater tendency to incorporate into his or her memory of an event, information that may have been suggested during questioning about the event. It is therefore critical to the competency determination for a defendant to have the opportunity to cross-examine a child witness to determine whether suggestion may have played a role in the child's memory. In addition to the right to have his lawyer cross-examine the witness, this defendant had the right to be present to assist his counsel, *Illinois v. Allen*, 397 U.S. 337 (1975), and to require his accusers to stand face-to-face with him.

Face-to-face confrontation "forms the core of the values furnished by the confrontation clause." *Ohio v. Roberts*, 448 U.S. 56, 63 n.5 (1980). The American Psychological Association's *amicus*

brief filed in support of the petitioner also argues that the defendant's presence can assist the court in making a reliable determination of the child's competency.

Although public policy and a compelling state interest may require a court to balance a defendant's rights under the confrontation clause, *Mattox v. United States*, 156 U.S. 237 (1895), no such compelling interest exists here. *Pointer v. Texas*, 380 U.S. 400 (1965). No evidence was presented below to establish that this defendant's presence at the competency hearing would have had an adverse effect on the child witnesses. Therefore, no grounds exist on which to base the denial of this defendant's right to confrontation. According to the American Psychological Association, there is very little social science data to support the belief that a

defendant's presence would have a negative psychological effect on child witnesses. Without such data and specific evidence of injury to the child witnesses in this case, the trial court erred when it denied the defendant the right to be present at the hearing to determine the competency of the witnesses.

Throughout the nation, concern over child sexual abuse has produced near-hysterical responses. Legislators and prosecutors have increasingly sought to contravene the rights of defendants and even to assume their guilt in child sexual abuse cases. This has led to a willingness on the part of courts to allow the introduction of unreliable evidence from incompetent witnesses, to permit special hearsay exceptions for child witnesses, and to deny defendants the right of confrontation. *Amicus*

is extremely concerned that this trend to permit the prosecution to prove its case through unreliable evidence and in violation of the defendant's constitutional right to confrontation will seriously interfere with the fundamental purpose of the confrontation clause to advance "the accuracy of the truth determining process in criminal trials." *Tennessee v. Street*, 471 U.S. 409, 415 (1985).

ARGUMENT

I: THE SUPREME COURT OF KENTUCKY CORRECTLY CONSTRUED THE SCOPE AND APPLICATION OF THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE TO REQUIRE THE DEFENDANT'S PRESENCE AT THE COMPETENCY HEARING OF THE CHILD WITNESSES

A. The Confrontation Clause Guarantees the Right to Be Present At Any Stage of the Trial Proceedings When Witnesses are Testifying.

This Court has long held that "the right to confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). In *Snyder v. Massachusetts*, 291 U.S. 97 (1934), the majority of the Court held that the sixth amendment required the defendant's presence at all stages of the

proceedings when witnesses are testifying.

Recent cases have continued to hold that during stages of the trial in which the defendant confronts his accuser and other witnesses, the sixth amendment's confrontation clause affords the defendant the right to be present. *United States v. Gagnon*, 470 U.S. 522 (1985). During other stages of the trial, when the defendant's presence is related to his opportunity to defend or when his absence would render the trial unfair or the outcome unjust, the right emanates from the due process clause of the fourteenth amendment. *Faretta v. California*, 422 U.S. 806 (1975). "The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, . . . but we have recognized

that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (citations omitted). Because the hearing to determine the competency of the witnesses below involved the testimony of witnesses against the defendant, the confrontation clause required that the defendant be present at the hearing.[1]

---

[1] The competency hearing is a critical stage of the trial proceedings, because the defendant is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). Therefore, the due process clause would also apply to ensure the defendant's right to be present. It is the view of *amicus* that it makes no difference whether the origin of the right is in the sixth amendment or in the fourteenth amendment. Indeed, in *Chambers v. Mississippi*, 410 U.S. 284

(Footnote 1 continued on next page)

The confrontation clause serves several purposes: It promotes reliability in criminal trials by ensuring an opportunity for effective cross-examination, the "greatest legal engine ever invented for the discovery of truth," *California v. Green*, 399 U.S. 149, 158 (1970); it requires the witness to testify under oath, "thus impressing him [or her] with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury," *Id.* at 158; it advances "the accuracy of the truth-determining process in criminal trials," *Tennessee v. Street*, 471 U.S. 409, 415 (1985); *Dutton v. Evans*, 400 U.S. 74, 89 (1970); and it

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(Continuation of Footnote 1)

(1973), this Court held that the confrontation right was in essence a right to a fair opportunity to defend against the state's accusations and therefore itself a part of due process of law.

promotes the perception that "fairness prevails", *Lee v. Illinois*, 106 S. Ct. 2056, 2062 (1986). In sum, face-to-face confrontation "forms the core of the values furnished by the Confrontation Clause." *Ohio v. Roberts*, 448 U.S. 56, 63 n.5 (1980).

This case implicates several of the purposes of the confrontation clause identified above. The testimony of the child witnesses in this case was the only evidence against the defendant. The reliability of their testimony was absolutely critical. Because this Court has consistently required the defendant's presence whenever witnesses are testifying, the decision of the trial court to hold a hearing to determine the competency of these witnesses and then to question them behind closed doors while the defendant waited reluctantly outside,

denied the defendant his sixth amendment right to be present.

The decision to exclude the defendant from the competency hearing thwarted the fundamental purposes of the confrontation clause because it denied the defendant the ability to assist his counsel in cross-examination, "one of the defendant's primary advantages of being present . . .", *Illinois v. Allen*, 397 U.S. 337, 344 (1970); it denied the court the opportunity to observe the witness' demeanor while testifying in front of the defendant, *Mattox v. United States*, 156 U.S. 237, 244 (1895); and it completely destroyed any perception that "fairness prevails." *Lee v. Illinois*, 106 S. Ct. 2056, 2062 (1986).

B. A Hearing to Determine the Competency of Witnesses to Testify at Trial is a Stage of the Trial

Proceedings. The Protection of the Confrontation Clause of the Sixth Amendment Therefore Extends to Such a Hearing.

1. The determination of the competency of a witness is a factual determination.

A court might determine the competency of a witness during trial, before trial, or at a separate hearing such as a preliminary examination. Held at any time, a hearing to determine the competency of a witness is a proceeding where witnesses are being questioned; therefore, the confrontation clause applies.

The petitioner's argument that the protection of the confrontation clause is limited to those portions of the trial "where evidence is being presented to the trier of fact" does not exclude a hearing to determine the competency of witnesses

from the protection of the clause. Pet. Br. at 15. A competency hearing involves the taking of testimony to determine whether the witness is capable of understanding the requirements of testifying under oath. To the extent that the court hears evidence and makes this determination, the court is acting as a fact-finder.[2]

The petitioner relies on statements from this Court to the effect that the right to confrontation is "basically a trial right," *Barber v. Page*, 390 U.S. 719, 725 (1968). In *Barber*, the Court did not seek to limit the confrontation right, rather, it

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2 *See e.g.*, "Preliminary questions concerning the qualifications of a person to be a witness, . . . shall be determined by the court, . . ." Fed.R.Evid. 104(a). "To the extent that these inquiries are factual, the judge acts as a trier of fact." Fed.R.Evid. 104 Advisory Committee Note.

sought to ensure its applicability at trial. The Court explained that affording the right to confrontation during a pre-trial hearing did not necessarily satisfy the requirement of affording the right at trial because confrontation includes the opportunity to cross-examine the witness and the opportunity for the fact-finder to weigh the demeanor of the witness. *Id.*

This Court has never limited the right of confrontation to the actual trial. The only limit this Court has placed on the application of the confrontation clause is "to the stages of the trial when there are witnesses to be questioned." *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934). *Amicus* believes that the intent of this Court's rulings consistently has been to extend the

protection of the confrontation clause to all proceedings when witnesses are being questioned.[3]

The hearing to determine the competency of the witnesses required the trial court to act as a fact-finder and, based on the factual evidence presented through examination and cross-examination of the child witnesses, to make a legal ruling that was absolutely crucial to "the accuracy of the truth-determining

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[3] Although this Court has not had occasion to consider precisely the issue presented here, various state courts have considered the issue and some have held specifically that the confrontation clause applies to hearings to determine the competency of witnesses. *See, e.g., United States v. Ashe*, 478 F.2d 661 (D.C. Cir. 1973); *State v. Braggs*, 604 S.W.2d 883 (Tenn. Ct. App. 1980); *State v. Harris*, 107 Ariz. 41, 481 P.2d 504 (1971). *See also, Stephenson v. Superior Court*, 91 Cal.App.3d 925, 154 Cal.Rptr. 476, 479 (1979), ("[T]he right to confrontation is not limited to the trial stage of proceedings. Rather, it extends to any stage when there are witnesses to be questioned.")

process in criminal trials." *Tennessee v. Street*, 471 U.S. 409, 415 (1985). This defendant had a fundamental constitutional right under the sixth amendment to be present while the court made these essential factual findings and his accusers were testifying.

Indeed, the trial court's decision as to the children's competency to testify in the instant case was the most important ruling in the entire trial. "Had the trial court determined the children were not competent, there may have been no trial. Appellant had a 'constitutional right to be present' at the competency hearing." *Moll v. State*, 351 N.W.2d 639, 645 (Minn. App. 1984) (Popovich, C.J., concurring).

2. *The Determination of the Competency of a Child Witness Requires a Factual Finding that the Witness can Separate the Truth from Fiction.*

The standard for competency in Kentucky is "whether the child is sufficiently intelligent to observe, recollect and narrate the facts and has a moral sense of obligation to speak the truth." *Capps v. Commonwealth*, 560 S.W.2d 559, 560 (Ky. 1977). This standard incorporates two separate considerations. First, the trial court must decide whether the child's intelligence is sufficient to explain what may have happened to him. Second, the court must determine whether the child understands his or her obligation to tell the truth. The first consideration is the crucial consideration here. If the child cannot accurately recollect events, he or she is not competent to testify.

The memory of an event is affected not only by the initial encoding but also

by suggestions made either before or after the event.[4] A child's capacity for memory is not the same as an adult's because children are more susceptible to suggestion than adults. Cohen, Ronald L. and Harnick, Mary Ann, *The Susceptibility of Child Witnesses to Suggestion*, 4 Law & Human Behavior 201, 203 (1980), [herein-

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4 In one study, subjects viewed a film of a car accident. Some of the subjects were questioned with neutral verbs, i.e., did you see the cars *bump* into each other? Other subjects were questioned with more violent verbs, i.e., did you see the cars *smash* into one another? Those questioned with the more violent verbs gave higher speed estimates after viewing the film than the subjects questioned with more neutral verbs. Those who had heard the word "smashed" answered "yes" a week later to a question of whether there was any glass at the scene of the accident when in reality there had been none. "Memory in this instance seems to be composed of information gathered during the perception of the event, and external information supplied after the event." Cohen, Ronald L. and Harnick, Mary Ann, *The Susceptibility of Child Witnesses to Suggestion*, 4 Law and Human Behavior 201, 203 (1980).

after cited as Law and Human Behavior]. The younger the child, the more likely it is that he or she will incorporate into his memory of an event information "suggested" to him during questioning about the event. *Id.*

It is essential that a defendant be permitted to cross-examine the child witnesses regarding who else has questioned them. It may become necessary to call additional witnesses or experts to testify at a competency hearing to determine what, if any, effect suggestive questioning may have had on the children's ability to recollect events accurately.

The defendant's right to cross-examination and confrontation was critical to the competency hearing below because suggestion may have played a role in the children's ability to remember events. It is truth that we are after,

not verisimilitude. If the defendant's counsel had the right to cross-examine the children, which he did without objection (J.A. at 23), the defendant had the right to be present to assist his counsel and to confront these witnesses. *Illinois v. Allen*, 397 U.S. 337 (1970). A competency hearing is not a legal argument where the defendant's presence is "useless, or the benefit but a shadow." *Snyder v. Massachusetts*, 291 U.S. 97, 106-7 (1934). The defendant's presence had an independent reliability value.[5] *Ohio v. Roberts*, 448 U.S. 56, 64 n.6 (1980).

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5 "The requirement of personal presence . . . undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial." 4 Weinstein, J. and Berger, M., *Weinstein's Evidence* §800[01], p. 800-10 (1979).

> The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel.

United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979) (footnote omitted).

The American Psychological Association in its *amicus* brief filed in support of the petitioner in the instant case [hereinafter cited as APA Br.] concurs: "[A]t least in some circumstances, cross-examination by the

> accused's counsel *with the accused present*, will assist the court in making a reliable determination of a child's competency. Those circumstances include those similar to the case *sub judice*, in which the accused lives with the child witness and may have some special knowledge of the child's intellectual and moral capacities which bears on the child's competency." APA Br. at 13.

Because suggestion is the "one factor (which) more than anything else devastates memory and plays havoc with our best intended recollection", Law and Human Behavior at 203, it is also necessary during a competency hearing to determine not only what effect previous suggestions may have had on the child's current ability to recall events truthfully, but what effect

suggestiveness at the hearing itself may have. Thus, the hearing to determine competency of the witness "becomes a crucial point in the proceedings because suggestion, through leading questions about the assault during that competency hearing, may dictate how the child will later testify at trial." *Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 Minn.L.Rev. 1377, 1384 (1985).

The fundamental purpose of the confrontation clause, to promote reliability in trials, *California v. Green*, 399 U.S. 149 (1970), was completely thwarted by denying the defendant below the right to be present during the examination of the child witnesses at the competency hearing. The defendant was present and available (J.A. at 14). Furthermore, he specifically

voiced his desire to be present (J.A. at 15). No court would consider requiring a defendant to wait outside while the court heard evidence relevant to the voluntariness of a confession or heard a proffer that a witness intended to refuse to testify on fifth amendment grounds. A hearing to determine the competency of witnesses is no different. The defendant should have been present.

II: BECAUSE THERE IS NO EVIDENCE THAT THIS DEFENDANT'S PRESENCE AT THE COMPETENCY HEARING WOULD HAVE HAD AN ADVERSE EFFECT ON THE CHILD WITNESSES, NO FOUNDATION EXISTS ON WHICH TO BASE A DENIAL OF THIS DEFENDANT'S RIGHT TO CONFRONTATION

"The confrontation clause reflects a preference for face-to-face confrontation at trial." *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). This rule, however, "must occasionally give way to considerations of public policy and the necessities of the case."

Mattox v. United States, 156 U.S. 237, 243 (1895).

The petitioner argues that the interests of the child compel tipping the scale of justice so that the defendant is denied his right to confrontation. Pet. Br. at 26.[6] The petitioner, however, has offered no evidence of what that interest is or to what extent the children would be harmed by the defendant's presence at the hearing. In excluding the defendant from the competency hearing, the court below made no finding that the children could not testify in his presence, nor did the state present any evidence at that time to justify the denial of

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6 In *Pointer v. Texas*, 380 U.S. 400 (1965), this Court recognized that confrontation is a fundamental right. Therefore, the petitioner can prevail on this argument only upon a showing that the denial of this fundamental right is necessary to the accomplishment of a compelling state interest. *Roe v. Wade*, 410 U.S. 113 (1973).

the defendant's fundamental right to confrontation. This Court has required that lower courts closely examine the interests that compete with the defendant's confrontation rights before dispensing with those rights. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). In the absence of any evidence below, this Court should reject the petitioner's argument.

The APA *amicus* brief filed in support of the petitioner, after listing an impressive table of authorities, makes a compelling and well-reasoned argument why evidence must be presented to establish a compelling need sufficient to deny a defendant's right to confrontation.

To date, there is very little social science data to support the

general proposition that face-to-face confrontation by child victims of sexual abuse with their alleged abusers has any more negative psychological effects than such confrontation has for adult victims. Indeed, there are some studies that suggest that child victims who testify before their alleged offenders experience the psychological benefits of vindication and regaining control over their lives.

APA Br. at 6.[7]

No purpose can be served by determining competency with the defendant

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7 "Professional opinion and a few limited studies indicate that the effects of the criminal process on children vary. For some, retelling the story is like another assault, because the traumatic incident must constantly be relived and remembered. Other children come through the system easily and even

(Footnote 7 continued on next page)

absent when the child, if found competent, must testify in the courtroom in front of the defendant.[8] In fact, a hearing in chambers in "a more informal and less awesome setting than the courtroom - may serve to lessen the trauma for the child who is found competent who will eventually testify in front of the offender at trial." APA Br. at 25.

Various state courts have been mindful of the concerns discussed above.

(Footnote 7 continued)

become desensitized; the system therapeutically aids these children by blaming the perpetrator and reinforcing the fact that the abuse was not the child's fault." *Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 Minn. L. Rev. 1377, 1384-85 (1985).

8 In the instant case, the children did testify in front of the jury with the defendant present. (J.A. at 31-85; 127-28).

In *Hochheiser v. Superior Court*, 161 Cal.App.3d 777, 208 Cal.Rptr. 273 (modified) 162 Cal.App.3d 517a, 208 Cal.Rptr. 273 (1984), the California Court of Appeals refused to allow a child witness in a child molestation trial to testify through closed-circuit television from outside the courtroom. The court held that even if closed circuit television could be used in some cases, a generalized belief in psychological trauma was insufficient to outweigh the defendant's right to confrontation without an evidentiary showing of psychological trauma to that particular witness. *Id.* at 283. The California court relied on this Court's decision in *Globe Newspaper Company v. Superior Court*, 457 U.S. 596 (1982), for the proposition that before a trial court could authorize the use of an evidentiary innovation to safeguard a minor witness,

the prosecution must first be required to establish a factual basis to support the nature of the injury, its degree and its potential duration. *Id.*

Similarly, in *Long v. State*, 694 S.W.2d 185 (Tx. App. 5th Dist. 1985), the court held that the Texas statute permitting the admission of videotaped testimony of the complaining witness violated the defendant's right to confrontation. The court stated that, although authorities recognize the potential trauma of in-court testimony, there was no evidence in the record that the child was, or that "sex abuse victims generally are, emotionally disturbed, reluctant to testify or intimidated by the accused". *Id.* at 191. According to the American Psychological Association, "both psychological theory and clinical experience suggest that the emphasis on 'protecting' child victims from

testifying and other aspects of participation in the legal process may be misplaced." APA Br. at 20.

Amicus is extremely concerned with what appears to be a "state of awareness, often bordering on hysteria, concerning child sexual abuse", that has led to a nation-wide trend in child abuse cases to contravene defendants' rights and to make an assumption of guilt. Graham, Michael H., *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. Miami L. Rev. 19, 20 (1985). The petitioner here is not immune from this hysteria. Its brief makes repeated references to "the special needs of this large class of victims/witnesses", Pet. Br. at 27-28, and statements such as "Stincer's cloak of constitutional claims cannot hide the substance of his ploy",

Pet. Br. at 26, belie any concern for the presumption of innocence. Legislation, law review articles, decisions, and briefs concerning child sexual abuse are replete with implied and even explicit assumptions of guilt, continually stressing the need for conviction even if premised on the testimony of an incompetent child, or unreliable hearsay, or on the denial of the right of confrontation.[9]

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9 *See e.g.*, Ordway, *Parent-Child Incest: Proof at Trial Without In Court Testimony by the Victim*, 15 U. Mich. J.L. Ref. 131, 138 (1981) ("one child of tender years in a small office with prosecutor, defense counsel, judge, reporter and the *perpetrator*.") (emphasis added); Berliner, Lucy, *The Child Witness: The Progress and Emerging Limitations*, 40 U. Miami L. Rev. 167, 172 (1985) ("Recently, there has been a surge of legislative proposals designed to provide protection for child witnesses.

(Footnote 9 continued on next page)

Over 40 years ago the Connecticut Supreme Court refused to admit evidence of an incompetent child witness against a defendant charged with sexual abuse. The Connecticut court characterized the state's argument as requesting "that the evidence be admitted, for otherwise a conviction could not be obtained."

(Footnote 9 continued)

Such legislation usually entails limiting some of the rights to which defendants are currently entitled."); *Moll v. State*, 351 N.W.2d 639, 644 (Minn. App. 1984) ("We believe the burden of young sex victims should be made lighter, not more onerous, not only to ensure that sex *abusers* are fully prosecuted, but to aid in the victims' recovery from this traumatic experience.") (emphasis added); *People v. Breitweiser*, 38 Ill.App.3d 1066, 349 N.E.2d 454, 456 (1976) ("The trial court's discretion in dealing with a child of tender years did not infringe upon the defendant's right to confront or cross-examine the witness . . ."). *Amicus* brief of Attorney General of Arkansas, filed in support of petitioner herein (22 states have enacted special hearsay exceptions for child sexual abuse victims and 27 states have adopted rules providing for videotaping of child witnesses.).

State v. Segerberg, 131 Conn. 546, 41 A.2d 101, 103 (1945). In refusing to permit the testimony, the court held that the state's argument was based on an assumption of guilt and that its inability to prove its case through receipt of proper evidence should not "throw the door open to the receipt of improper evidence; otherwise, the proof of such offenses would be possible without the confrontation of witnesses and without the safeguards of cross-examination, proceedings which have ever been a cornerstone of our civil liberties." *Id* at 103-4.

> Altering a system that society has accepted as an adequate method for obtaining the truth and protecting the innocent must be done with care. To ignore the presumption of innocence and the importance of procedural

> guarantees in order to protect an accuser may hinder the search for truth and lessen the accuracy of fact finding.

Mlyniec, Wallace J. and Dally, Michelle M., *See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?*, 40 U.Miami L.Rev. 115, 118 (1985).[10]

Child sexual abuse is an extremely serious charge and conviction usually means years, perhaps a lifetime in jail. The seriousness of the offense and the devastating consequences of conviction

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[10] Indeed, this rush to judgment has resulted in numerous cases where innocent defendants have been labeled perpetrators, forced to stand trial and then acquitted, but not before their lives and reputations have been ruined. *See*, Gest, Ted, *The Other Victims of Child Abuse*, U.S. News & World Report, April 1, 1985, at 66.

should make the courts more, not less, determined to extend the full panoply of constitutional protections to all defendants.

CONCLUSION

This Court should affirm the judgment of the Supreme Court of the Commonwealth of Kentucky.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 86-572 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF KENTUCKY,

Petitioner,

—v.—

SERGIO STINCER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Was certiorari improvidently granted where the state Supreme Court decision on review cites only its own opinions, makes only one brief passing reference to federal law, and plainly tracks the relevant state constitutional provision throughout its discussion of the case?

2. Do due process and the Sixth Amendment protect the right of an accused to attend a mid-trial evidentiary hearing into the competency of the primary prosecution witnesses against him, in the absence of a showing that his presence would disturb either the witnesses or the proceeding?

3. Is a trial court required to investigate the availability of less drastic measures before it excludes an accused from a mid-trial evidentiary hearing into the competency of the primary prosecution witnesses thereby completely disrupting his opportunity to participate in that phase of his defense?

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE, AND STATEMENT OF INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union respectfully moves for leave to file a brief, annexed hereto, as Amicus Curiae in this case. The brief is filed in support of the respondent.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by the Constitution and laws of the United States.

The ACLU has long worked to protect the rights of the accused, and in particular the rights of all persons under the Fifth and Sixth Amendments of the Constitution, guaranteeing due process of law and various crucial trial rights, including the right "to be confronted with the witnesses against him." Toward that end, the ACLU has filed many

briefs in this Court, as counsel for a litigant or as amicus curiae, in cases requiring the interpretation of these and other federal constitutional provisions related to criminal procedure and criminal law.

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TABLE OF CONTENTS

QUESTIONS PRESENTED i

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE, AND STATEMENT OF INTEREST OF THE AMICUS CURIAE ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

INTEREST OF AMICUS 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 14

ARGUMENT 17

I. THE COURT SHOULD DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED BECAUSE THE JUDGMENT BELOW RESTED ON INDEPENDENT AND ADEQUATE STATE GROUNDS 17

II. DUE PROCESS AND THE SIXTH AMENDMENT PROHIBIT THE INVOLUNTARY EXCLUSION OF A CHILD SEXUAL ABUSE DEFENDANT FROM A HEARING INTO THE COMPETENCY OF THE WITNESSES AGAINST HIM 21

A. The Sixth Amendment Prohibits The Involuntary Exclusion Of An Accused From A "Trial-Like" Mid-Trial Competency Hearing Concerning The Witnesses Against Him 25

B. The Due Process Clause Likewise Prohibits The Involuntary Exclusion of an Accused From The "Trial-Like" Mid-Trial Competency Hearings At Issue In This Case 37

C. Because The Defendant's Right to Participate in His Defense Is a Strictly Personal One, The Constitutional Errors Committed Here Were Not "Cured" By Allowing His Counsel To Attend The Competency Hearing 44

III. EVEN IF THE COURT DOES NOT AFFIRM THE DECISION BELOW, IT SHOULD NONETHELESS VACATE DEFENDANT'S CONVICTION BECAUSE THE TRIAL COURT NEITHER MADE SPECIFIC FACTUAL FINDINGS NOR PURSUED ALTERNATIVES DESIGNED TO MINIMIZE THE IMPACT OF DEFENDANT'S INVOLUNTARY EXCLUSION 49

A. No Specific Fact-Finding 50

B. Alternatives Short of Complete Exclusion 54

CONCLUSION 58

TABLE OF AUTHORITIES

Cases

Barber v. Page,
390 U.S. 719 (1968) 25

Dandridge v. Williams,
397 U.S. 471 (1970) 25

Diaz v. United States,
223 U.S. 442 (1912) 22

Dowdell v. U.S.,
221 U.S. 325 (1911) 25

Faretta v. California,
442 U.S. 806 (1975) .....passim

Fay v. Noia,
372 U.S. 391 (1963) 45

Frank v. Magnum,
237 U.S. 309 (1915) 26

Gerstein v. Pugh,
420 U.S. 103 (1975) 35, 36

Gilbert v. California,
388 U.S. 263 (1967) 34

Henry v. Mississippi,
379 U.S. 443 (1965) 45

Hopt v. Utah,
110 U.S. 574 (1884) 27, 37, 42

Illinois v. Allen,
397 U.S. 337 (1970) .....passim

Johnson v. U.S.,
318 U.S. 189 (1943) 23, 26, 27

Lee v. Illinois,
106 S.Ct. 2056 (1986) 33

Lewis v. U.S.,
146 U.S. 370 (1892) 21

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 26

Michigan v. Long,
463 U.S. 1032 (1983) 20, 21

Painter v. Texas,
380 U.S. 400 (1965) 37

Parratt v. Taylor,
451 U.S. 527 (1981) 26

Price v. Johnston,
344 U.S. 266 (1948) 25, 47

Rushen v. Spain,
464 U.S. 114 (1983) 23

Schwab v. Beggren,
143 U.S. 442 (1892) 25

Snyder v. Massachusetts,
291 U.S. 97 (1934) .....passim

Taylor v. United States,
414 U.S. 17 (1973) 22

U.S. v. Ash,
413 U.S. 300 (1973) 34

U.S. v. Gagnon,
470 U.S. 522 (1985) 23, 26

U.S. v. Hayman,
342 U.S. 205 (1952) 27

U.S. v. New York Telephone,
434 U.S. 159 (1977) 25

U.S. v. Wade,
388 U.S. 218 (1967) 34

Other Authorities

Note, Defendant's Right in Child Witness Competency Hearings: Established Constitutional Procedures for Sexual Abuse Cases, 69 Minn. L. Rev. 1377 (1985) 31, 32

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

No. 86-572

Commonwealth of Kentucky,

Petitioner,

v.

Sergio Stincer,

Respondent.

On Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

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BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

The Statement of Interest of Amicus is contained in the foregoing Motion for Leave to File a Brief Amicus Curiae.

STATEMENT OF THE CASE

This case involves serious charges of child sexual abuse involving oral sodomy that were brought in 1984 by the state of Kentucky against Sergio Stincer, a recent Cuban immigrant to this country. At Mr. Stincer's trial, which took place in rural Christian County, Kentucky, the evidence against him consisted primarily of the testimony of two seven and eight year-old girls. The defendant contended at trial that the events alleged never took place and that the girls had made their accusations at the instigation of their aunt, one of defendant's several girlfriends, who was motivated by personal animosity toward her admittedly "two-timing" boyfriend, the accused.

The high risk of jury prejudice arising from the inherently inflammatory nature of all child sexual abuse charges, and the fact that such cases so frequently depend upon

close judgments concerning the credibility of accusers and accused, led the Kentucky Supreme Court, in its decision below, to hold that a hearing to determine the competency of prospective child sexual abuse witnesses is a critical and crucial phase of child sexual abuse prosecutions in Kentucky. In addition, as the record makes clear, several special circumstances particular to this case made the children's capacity to testify of exceptional importance to the outcome of respondent's trial, even as compared to other trials of its type.

A. The Critical Nature of Competency In This Case

At least five different factors in the trial of this case make clear that the competency hearing at issue here assumed an extraordinary significance with respect to the trial's outcome, even as compared to similar hearings in other child sexual abuse cases.

1. As the transcript of the proceedings makes clear,[1] Mr. Stincer's lack of facility in the English language presented a major -- and highly visible -- impediment to the proper presentation of his defense, which consisted in outright denial of the charges. Throughout the proceedings, Mr. Stincer consistently lacked the ability to make himself understood either to the reporter, who frequently transcribed the defendant's remarks with the notation "phonetic" (to indicate that they were incomprehensible), or to his

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1/ It is important to note at the outset that the child witness competency hearing at issue in this case is not any sort of pretrial proceeding, remote in time or circumstance from the actual trial itself. Rather, as the full record in this case makes clear, the hearing at issue occurred at trial after the jury had been selected and sworn. Compare Transcript of Evidence at p. 12 (swearing of jurors) with Transcript of Evidence at 15 (beginning of competency hearings). Thus, any question of a defendant's right to attend a pretrial competency hearing is simply not presented by this case. In addition, it may also fairly be presumed that in this case (and others like it) the full panoply of audio and video devices so frequently mandated by state law for use in child sexual abuse trials was readily at hand. See Point III, infra.

own counsel, who indicated to the court, that in speaking for the accused, he was merely making suppositions concerning what he believed his client was saying or had said (J.A.2).

More importantly, because of his difficulty in making himself understood, Mr. Stincer's effort to testify in his own behalf -- critically important in a case where guilt or innocence turned on the relative credibility of the under-age accusers and the accused -- was seriously undermined.[2] The easily

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2/ The difficulties presented by the defendant's language problem were, moreover, aggravated, for purposes of presenting his defense, by the inconsistent use of the court's interpreter during his testimony: instead of using an interpreter consistently throughout his testimony, to translate every question and every answer, the interpreter's assistance was invoked irregularly, only when Mr. Stincer's attempts to answer were particularly unclear. On more than one occasion during Mr. Stincer's direct testimony, what he was trying to say became so unclear and confusing that jurors intervened to ask that the defendant's answers be clarified (J.A.60, 63); on cross-examination, the court apparently requested that the interpreter conduct an off-the-record inquiry on her own, to achieve at least a minimal clarity (J.A.77).

foreseen result was an unusually garbled and disjointed defense presentation, likely to affect the perception of credibility, but arising from factors having nothing to do with actual innocence or guilt. These inherent limitations on Mr. Stincer's ability to testify effectively in his own behalf only accentuated the seriousness of the evaluation of the testimonial capacities of his accusers.

2. The importance of the inquiry into the testimonial capacity of the young girls was further heightened by serious emotional limitations on their ability to perform as witnesses at trial. Although the trial court imposed no formal limits upon defense counsel's right to cross-examine these young girls, the girls' youth and personal characteristics imposed severe restrictions on his ability to do so. On cross-examination, for example, both girls refused to answer legiti-

mate, mildly phrased questions concerning the possibility that their accusations had been instigated by their aunt or, in one case, even to repeat the accusation itself.[3/] Given these severe constraints on defendant's ability to conduct a meaningful cross-examination, arising from easily foreseeable emotional factors on the part of these young girls, the decision whether the girls could take the stand assumed an especially critical importance in this trial.

3. The record also makes clear that this was not a case where evidence of guilt was overwhelming. For one thing, just prior to the trial, the prosecutor consented to dismissal of an additional child sexual abuse

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3/ Indeed, on re-direct, when the prosecutor asked one child witness whether she could clarify what he conceded was "confusion" that had been created by her contradictory testimony as to whether the crime had occurred, she ended her testimony by saying, in a state of emotional breakdown and withdrawal, "I can't," thus leaving the "confusion" recognized even by the prosecutor entirely unclarified (J.A.59).

charge that had been lodged against defendant (J.A.1) when the complaining witness, another young child, present on the same occasion on which the charges that went to trial centered, suddenly abandoned his earlier claim that the defendant had put anything other than pudding in his mouth. In addition, one of the children who did testify subsequently made a strikingly similar admission on cross-examination,[4] shortly before she became unable to -- or, in any event, ceased to -- respond to further defense questions concerning whether the crime occurred. For these and other reasons,[5] there is

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[4] She stated that defendant only gave her pickles. (J.A.51, 52).

[5] Doubts as to Mr. Stincer's guilt are heightened by, among other things, the complete inability of the third young witness, a five-year-old boy, to remember what had transpired, or do anything other than agree with every leading question that either side put to him. Moreover, as incredible and visibly incompetent as this witness generally was, it does bear noting that he did, among other things, confirm, as defendant had contended, that his mother had told him what to say in court. See Transcript of Evidence at 91, 101.

considerable good-faith reason to doubt that Mr. Stincer should have been convicted of the crimes charged.

4. The results of the competency hearing were themselves less than clear cut. The witness who later testified that the crime had not occurred explicitly told the court at one point during the competency hearing that she did not know the difference between the truth and lies (J.A.7-8), and caused the judge to remark, "I don't know about this one" (J.A.8), and "I think it's somewhat close" (J.A.10). Although the judge ultimately did conclude that both girls could tell the difference between truth and falsehood, he pointedly avoided making any inquiry that might have revealed their capacity to remember the events at issue or undertaking any exploration of their capacity to express their perceptions. Thus, the greater part of what the state itself here identifies as "the

standard for competency" under Kentucky law -- "whether the child is of sufficient intelligence to observe, recall and narrate facts," (Petitioner's Brief, hereinafter "P.B.," at 19) (emphasis added) -- was not examined at all.[6/]

5. Although petitioner repeatedly suggests that defendant's interest in being present during the competency hearing was motivated by a desire to intimidate the child witnesses, the record not only fails to support this allegation, but strongly suggests that the presence or absence of the defendant was completely irrelevant to the state of mind of the prospective child witnesses.

6/ Indeed, the trial judge stated his understanding of the governing legal rule in terms that contrast sharply with those the state admits to be controlling. According to the trial judge, "I think she understands the difference between the truth and a lie and I think that is the issue before us" (J.A.6). The state, in its brief to this Court, thus implicitly acknowledges that the trial judge misunderstood and misapplied the relevant substantive standard under governing state law.

Although one of the young witnesses was originally scared "about who would go up there and stuff" (J.A.6), at the end of the competency hearing, the youngster who made this statement claimed she had relaxed. When she subsequently became unable to answer defense questions in open court concerning whether the crime occurred, she expressly denied that "anybody in the courtroom [was] bothering ... or frightening" her (J.A.36). Rather, in refusing to repeat the key testimony, she admitted she was "afraid of getting in trouble" (J.A.38), a fear that throughout the proceedings had only been associated with telling an untruth.

Similarly, although the other witness also confessed to being "scared," she said it was the judge, defense counsel, and the people in the courtroom generally who "scared" her (J.A.44, 49, 50).

At no point, despite repeated question-

ing, did either of these two young witnesses suggest in any way, directly or indirectly, that the presence of the defendant, as opposed to the need to testify itself, was responsible for her fear or her refusal to continue testifying. There is thus not the least indication in the record that the defendant's presence had, or would have had, the slightest intimidating motive or effect.

B. **The Special Importance of Competency Hearings in Kentucky Child Sexual Abuse Cases**

Although petitioner has argued, mistakenly in the view of amicus,[7] that the Kentucky Supreme Court decision at issue here rests on federal rather than state law, it has conspicuously failed to dispute that court's factual conclusions, arising from its analysis of the practical realities of the present Kentucky criminal trial system, (1)

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[7] See Point I, infra.

that "the competency hearing was a crucial phase of the trial" (J.A.82), (2) that "[t]he determination of whether the child witnesses could testify was critical to the prosecution's case" against Mr. Stincer (J.A.82), and (3) that without the children's testimony respondent's "trial might not have taken place" (J.A.83).

As will be shown below, these undisputed findings concerning the Kentucky criminal trial system are, by themselves, dispositive of this case.

SUMMARY OF ARGUMENT

1. Although the decision below does not contain an explicit statement that it is based on state law grounds, a fair reading of the opinion below makes clear that a state law ruling is in fact what the Kentucky Supreme Court intended to render. Consequently, this Court should dismiss certiorari as improvidently granted.

2. Because of the risk of prejudice inherent in any child witness competency hearing in a child sexual abuse prosecution, the defendant's right to be present during such proceedings must be protected by the Sixth Amendment and due process clauses. In addition, certain special circumstances of this case -- including the defendant's inability to express himself in English (which encumbered the effective presentation of his side of the case for reasons unrelated to his guilt or innocence), as well as the

refusal and/or inability of the child witnesses to submit to meaningful cross-examination at trial -- increased the critical importance of the competency hearing in this case. This conclusion is further reinforced by the Kentucky Supreme Court's ruling below that a child witness competency hearing is a "critical" and "crucial" phase of child sexual abuse prosecutions in that state. And because the accused's right of presence is a personal one, the error of excluding him cannot be "cured" by having admitted his counsel to the proceeding at issue.

3. Even if the Court believes that defendants may sometimes be excluded from competency hearings of the sort at issue here, this respondent's conviction must nonetheless be vacated because the trial court did not make a record demonstrating the factual basis for its decision to exclude the

defendant, or determine whether there were viable alternatives to complete exclusion of the accused from participation in his own defense that might have satisfied its concerns.

ARGUMENT

I. THE COURT SHOULD DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED BECAUSE THE JUDGMENT BELOW RESTED ON INDEPENDENT AND ADEQUATE STATE GROUNDS

Although the Kentucky Supreme Court opinion upon which the judgment before this Court depends does not explicitly state that it rests on Kentucky, as opposed to federal grounds, a fair reading of that opinion clearly establishes that it was a state law decision that the court below intended to render.

The facts supporting this conclusion are several:

a. The decision below contains only one reference to federal law, a passing mention of the existence of a "right to confrontation" under the Sixth Amendment, whose scope (aside from a general remark that protection of the right to cross-examination is its "main purpose") was never further

specified or discussed (J.A.82). This passing reference to the Sixth Amendment occurs only in a dependent clause introducing the analogous provision of Kentucky law, which itself is then spelled out in detail, so that its scope, applicability, and implications for the case at hand may be discussed;

b. The precise context of this single reference to federal law also is of note. The court below said:

> In addition to the right of confrontation provided in the Sixth Amendment to the United States Constitution, the eleventh section of The Bill of Rights of the Kentucky Constitution guarantees the accused in a criminal prosecution the right to be heard by himself and counsel and to meet the witnesses (against him) face to face. (J.A.82) (emphasis added)

It is readily apparent that all the Kentucky Supreme Court intended to suggest by this passing reference to federal law was the general subject matter similarity of the two

provisions. The passage in question expressly states not that Kentucky rights are intermingled with, or dependent on, federal ones, as would be necessary to support jurisdiction in this Court; it says exactly the opposite: that state constitutional rights are separate and "in addition to" the federal ones;

c. The remainder of the opinion does not cite any federal cases, or any cases from outside Kentucky, except to mention one state case whose holding it rejects; and

d. The remainder of the opinion, where the right of presence question is more fully analyzed and discussed, consistently quotes verbatim the Kentucky constitutional provision's guarantee of an accused's right to "face-to-face" meetings with witnesses, rather than the analogous federal language, whenever the right at issue is discussed.

* * *

To be sure, it would have been preferable if the state court had made its reliance on state law for the rule of decision absolutely explicit. See Michigan v. Long, 463 U.S. 1032 (1983). Yet the reason the court below did not do so in this case is also clear. This Court has required a "plain statement" that state law was decisive only when confusion appeared on the face of the opinion as to what use the state court meant to make of the federal law it cited. Id. at 1041. Here, the only such citation is one brief reference to the Sixth Amendment's existence. There is simply no suggestion that the court below believed the federal, as opposed to the state, constitution guaranteed a right to a "face-to-face meeting" that it consistently indicated that it intended to

enforce.[8/]

Consequently, because the decision below rested on independent and adequate state law grounds, this Court should dismiss certiorari as improvidently granted.

II. DUE PROCESS AND THE SIXTH AMENDMENT PROHIBIT THE INVOLUNTARY EXCLUSION OF A CHILD SEXUAL ABUSE DEFENDANT FROM A HEARING INTO THE COMPETENCY OF THE WITNESSES AGAINST HIM

This Court has long recognized that, following indictment, the fundamental rule must be "that nothing shall be done in the absence of the prisoner." Lewis v. U.S., 146 U.S. 370, 372 (1892).[9/] Moreover, the few occasions on which the Court has condoned criminal trial proceedings conducted in the

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8/ Indeed, the lower court opinion in this case is the polar opposite of the decision underlying Michigan v. Long. There, the lower court referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law. Id. at 1037. Here, the facts are exactly the reverse.

9/ This sound principle is now embodied as well, of course, in Fed.R.Crim.P. 43.

absence of the accused serve only to reemphasize the basic importance of this rule, for each of those cases involved an instance in which the defendant either voluntarily absented himself from the proceedings, Taylor v. United States, 414 U.S. 17 (1973), Diaz v. United States, 223 U.S. 442 (1912), or conducted himself in a manner so disruptive that the judicial process could not continue unless he was removed, Illinois v. Allen, 397 U.S. 337 (1970). And even in the latter case, the Court took pains to make clear to trial judges that involuntary exclusion of the accused from the proceedings against him was a special and drastic remedy, a bar which was to be lifted as soon as it appeared that the threat of actual courtroom disruption had -- even temporarily -- passed.[10/]

10/ The Court has also distinguished between occasions on which the defendant failed to object to his exclusion, or in which it concluded that the defendant's involuntary exclusion was either harmless [footnote cont'd]

There is no suggestion in this record that any actual danger of disruption existed in this case, nor was any attempt whatever made to show that the threat of "witness intimidation" was at all real. Rather, the decision to exclude defendant from the competency hearing of the primary prosecution witnesses against him rested entirely on the most speculative theoretical grounds -- a general and factually unsubstantiated assumption that his presence might possibly inhibit his underage accusers. Whatever basis such a premise might have generally, it has no basis in fact in the record before the Court; indeed, it was a circumstance into which the trial court did not even bother to inquire. Moreover, as noted in the brief amicus curiae

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or otherwise excusable. See Johnson v. U.S., 318 U.S. 189 (1943); Rushen v. Spain, 464 U.S. 114 (1983); U.S. v. Gagnon, 470 U.S. 522 (1985). Here, the defendant plainly did object and, for the reasons set forth in the remainder of this section, the Court cannot regard the exclusion at issue here as harmless.

of the American Psychological Association, this theoretical premise is without decisive support in the relevant scholarly literature, and may tend to bespeak a view of the child sexual abuse witness founded more in sentiment than in science.

Consequently, in view of the absence of a demonstrated risk that the judicial process would have been impaired by permitting defendant to attend the competency hearing of the witnesses against him, the involuntary exclusion of defendant from that hearing can only be condoned if the Court finds that the right to attend a trial-like mid-trial competency hearing in a child sexual abuse case falls outside the scope of the due process and Confrontation clauses. In truth, however, the right to be present at such hearings is plainly protected by both constitutional

guarantees.[11]/

A. The Sixth Amendment Prohibits The Involuntary Exclusion Of An Accused From A "Trial-Like" Mid-Trial Competency Hearing Concerning The Witnesses Against Him

The Court has long recognized that the right protected by the Confrontation Clause is basically a trial right. Barber v. Page, 390 U.S. 719 (1968). Therefore, while the Court has held that the accused need not be present for legal arguments concerning his post-conviction appeal, Price v. Johnson, 334 U.S. 266 (1948); Schwab v. Berggren, 143 U.S. 442 (1892); Dowdell v. U.S., 221 U.S. 325 (1911), it has never held that the accused may lawfully be excluded, over his objection,

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[11]/ Although the decision below does not expressly rely on the due process clause, respondent may, of course, defend that judgment on any ground which the law and record permit, provided that the asserted ground would not expand the relief which has been granted. U.S. v. New York Telephone, 434 U.S. 159, 168, n.8 (1977); Dandridge v. Williams, 397 U.S. 471, 475, n.6 (1970). Consequently, if the Court should reject the bases of decision actually set forth by the court below, it should nonetheless uphold the lower court's decision on due process grounds.

from any part of the testimonial process once the trial is underway, except by reason of the defendant's own misbehavior or default.12/

The Court has consequently held that the right to presence attaches to the voir dire

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12/ To be sure, the Court also has not insisted upon this principle in any unrealistic or formalistic way. Thus, noting that in complex trials some ex parte contact between the judge and jurors may fairly be deemed unavoidable, that some such contacts are not really "testimonial," and that the defendant's desire to be present on particular disputed occasions should ordinarily be made reasonably clear, the Court has adopted a flexible approach to evaluating the existence -- and significance -- of a possible constitutional infringement. See, e.g., U.S. v. Gagnon, 470 U.S. 522, 526 (1985); Johnson v. U.S., 318 U.S. 189 (1943); Frank v. Magnum, 237 U.S. 309 (1915). Plainly, this case involves no such informal or accidental occurrence, but rather the intentional exclusion of one criminally accused from an established and pre-arranged evidentiary proceeding involving state-produced witnesses against him, and over his clearly stated objection. Therefore, the considerations of realistic ad hoc flexibility underlying the Court's discussion in Gagnon, supra, have no application here. Compare, Parratt v. Taylor, 451 U.S. 527 (1981) (purely accidental deprivation causes by state official not actionable under §1983), with Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-37 (1982) (loss caused by intentional invocation of established state procedure is actionable).

of potential jurors even before guilt or innocence is actually put into issue or adverse testimony has been presented, Hopt v. Utah, 110 U.S. 574 (1884), and has adopted as a general rule the proposition that the Constitution guarantees the right of presence any time that guilt or innocence is actually put into issue. U.S. v. Hayman, 342 U.S. 205 (1952). Indeed, even in the instance in which the accused's presence might seem least immediately helpful -- that is, where the portion of the trial from which the defendant was excluded involved purely legal arguments -- the Court has assumed, at least for purposes of its immediate decision, that a constitutionally protected interest was at stake. See Johnson v. U.S., 318 U.S. 189 (1943).

The bases of these decisions have been two: the long-established common law right to confront witnesses that is essential to

an accused's sense of having been tried by fair and full procedures and, more practically, the fact that the participation of the accused is essential to the conduct of a defense that can respond effectively and quickly to the evidence adduced by the state. The Court has time and again made clear that this practical concern is especially important, with the justices insisting that even in those rare cases where the involuntary exclusion of the accused is warranted, care should nonetheless be taken to ensure that the sacrifice of this aspect of his Confrontation Clause rights be kept to a practical minimum. See, e.g., Illinois v. Allen, supra at 351 (Brennan, J. concurring).

In the context of a mid-trial hearing concerning the competency of the primary witnesses against the accused, the import of the Court's prior Confrontation Clause right-to-presence rulings is clear. All the practical

concerns underlying confrontation rights in hearings before the jury -- the ability to communicate with counsel, to suggest lines of inquiry known only to the accused, to inform counsel promptly that the witnesses' memory and veracity (even in areas not directly related to the facts of the alleged crime) are defective and the witness therefore potentially incompetent, to insist that appropriate contemporaneous objections be made -- all of these concerns apply with equal force to mid-trial evidentiary hearings into the competency of prospective child witnesses as well.

In this case, as in many child sexual abuse cases, the trial on the merits was in practice nothing other than a "swearing match" between accuser and accused. Thus, where the testimonial capacity of the child witness is at issue, and the nature of the child's anticipated testimony is inherently

inflammatory, the decision whether the child's testimony shall be presented may well be the central decision in the case. And this general proposition is all the more true where, as here, effective cross-examination of the child was, foreseeably, well-nigh impossible, and the defendant's ability to present his own side of the story was grievously, if blamelessly, impaired. Consequently, in child sexual abuse cases generally, and in this case in particular, the constitutional presumption that an accused has a right to attend all the trial proceedings must therefore necessarily include a right to attend mid-trial competency hearings concerning the child witnesses as well.

It also bears special emphasis that the risk of prejudice attendant to competency hearings in cases such as this extends beyond the mere risk of an erroneous conclusion: even those who support the exclusion of

defendants from such hearings acknowledge that the chance of actually engendering potentially fatal prejudice in such proceedings is very great indeed. Not only are the effects of an erroneous competency determination of great significance at trial, but a poorly conducted competency hearing can actually induce prejudice toward the accused. Since child sexual abuse competency hearings frequently involve inquiries into the facts underlying the alleged abuse, they present a real and substantial danger that unfounded accusations can actually be reinforced through repetition before impressive officials just prior to the taking of testimony on the merits. Note, Defendant's Right in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases, 69 Minn.L.Rev. 1377, 1384 (1985). Indeed, some commentators acknowledge that competency hearings not only can

reinforce false testimony, but actually can create it, due to the child witnesses' unusually high "suggestibility." See Note, supra. Competency proceedings thus not only run the normal risk of being mistaken in result, but the additional one of reinforcing -- or even creating -- damaging, if not fatal, testimony that is simply false.

The importance of the defendant's right to attend such proceedings is not, of course, in any way diminished by the suggestion that the ultimate issue -- the child's competence to testify -- is an issue of "law" rather than "fact", entrusted to the discretion of the trial court rather than to the jury. Regardless of the label attached to the trial court's conclusion, it is obvious that the conclusion at issue must be based on evidence, and it is precisely the right to attend the presentation of adverse testimonial evidence that the Confrontation

Clause most explicitly protects.[13/] Lee v. Illinois, 106 S.Ct. 2056 (1986).

That a defendant's Confrontation Clause rights must attach at a mid-trial evidentiary hearing concerning the competence of prospective witnesses against him is also confirmed by the analytic principles the Court has developed in another Sixth Amendment area -- the determination of the scope of the accused's right to counsel. In those decisions, the Court has laid down a variety of principles that may be used to measure the importance to the outcome of various phases

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13/ The fact that the inquiry at a competence hearing is, as a legal matter, directed at something other than the defendant's ultimate guilt or innocence also drastically undercuts any argument that error in the competency hearing process may somehow be "cured" by subsequent cross-examination of the same witness at the trial on the merits. Although the evidence may look similar, the object of the two testimonial inquiries is simply not the same, and facts that have great relevance at the competency stage may have less, or none, by the time of trial on the merits; in addition, entirely different strategic choices regarding possible lines of questioning may apply in one context or the other.

of the criminal trial and investigative process, and all of those principles serve to emphasize the special importance of the witness competency hearing in a child sexual abuse case.

Among the factors the Court has examined in assessing the right to counsel are "whether potential substantial prejudice to the defendant's rights inheres in the particular confrontation," United States v. Wade, 388 U.S. 218 (1967), whether the result of the phase in question will contribute to the accuracy of factual findings of fact when the proceeding as a whole is through, Gilbert v. California, 388 U.S. 263 (1967), and whether the criminal justice step at issue involves a trial-like confrontation between the individual and the state. United States v. Ash, 413 U.S. 300 (1973). By all of these standards, a mid-trial evidentiary hearing concerning the competency of the prime wit-

nesses against the accused more than qualifies as constitutionally "critical."

Moreover, the Court's careful Sixth Amendment analysis in Gerstein v. Pugh, 420 U.S. 103 (1975), where the issue concerned whether "the full panoply of rights -- counsel, confrontation, cross-examination and compulsory process for witnesses" must attach as a matter of federal constitutional law to post-arrest probable cause hearings in Florida state courts, further reinforces this conclusion. In that case, the Court held that the proper mode of analyzing the importance of a particular proceeding, for Sixth Amendment purposes, is to assess the importance of the proceeding to the particular state's criminal justice system as a whole. For two separate reasons, Gerstein necessarily establishes that a Kentucky mid-trial hearing into the competency of child witnesses in a child sexual abuse case must

necessarily be deemed constitutionally "critical."

First, and most obviously, a mid-trial "trial-like" confrontation concerning the ability of the primary witnesses against the accused to take the stand is self-evidently of critical importance, for all the practical reasons set forth earlier. But more than the usual general reasoning about the operation of Kentucky's criminal trial system is relevant here: The proceeding at issue on this appeal is one that the state's highest court has already specifically held to be "crucial" and "critical" in that state's criminal trial scheme.

To take the Kentucky criminal justice system "as a whole," as Gerstein mandates, it is essential to take into account this ruling by that state's highest court. Long before Gerstein, this Court held that such a finding of local law was by itself sufficient to

trigger federal constitutional guarantees concerning the right of criminal defendants to attend particular phases of their trials. See Hopt v. Utah, 110 U.S. 574 (1884) (Utah statute guaranteeing right to be present at juror selection enforced under federal constitution). This case merely calls upon it to do so once again.

B. The Due Process Clause Likewise Prohibits The Involuntary Exclusion of an Accused From The "Trial-Like" Mid-Trial Competency Hearings At Issue In This Case

Before the Court held the Sixth Amendment's Confrontation Clause applicable to the states in Painter v. Texas, 380 U.S. 400 (1965), the Court recognized that the right of the accused to be present at state criminal proceedings instituted against him was also founded in the due process clause of the Fourteenth Amendment. Snyder v. Massachusetts, 291 U.S. 97 (1934). In particular,

the Court emphasized, the general rule is, that as a matter of federal constitutional doctrine, "[a] defendant in a criminal case must be present at trial when evidence is offered," id. at 114, and that the definition of a "trial" must be a practical, rather than a formalistic, one. Id.

Under the Fourteenth Amendment, the Court held, the defendant in a felony case has a

> right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.

Id. at 105-06. Applying this standard, the Court, by a narrow majority, upheld the defendant's conviction in Snyder, which involved a defendant's asserted right to attend a jury crime-scene "view" at which no actual testimony was offered, and the reliability of which could be objectively verified without the defendant in attendance.

Holding that the due process right to presence did not extend to situations in which the presence of the accused would be "useless, or the benefit but a shadow," id. at 106, the Court made much of the fact that Snyder involved a situation in "which a scene and not a witness is to deliver up its message," id. at 115 (emphasis added), and attached critical significance to the fact that "physical objects [such as those seen at a "view"] are not witnesses." Id. at 119, 121. The relevant inquiry for determining a defendant's due process right to be present at particular proceedings, it said, is an analysis of "the facts in their totality." Id. at 116.

Under this "totality of the facts" due process analysis, the right of Mr. Stincer to attend the mid-trial competency hearing of his under-age accusers is, if anything, even more clear than his right to do so under the

Sixth Amendment. Here, unlike in Snyder, evidence from live witnesses indeed was taken; here, unlike in Snyder, factual conclusions were reached based upon the live testimony; and here, unlike in Snyder, the result of those conclusions -- that child witnesses who were difficult, if not impossible, to cross-examine would be allowed to place their intrinsically inflammatory direct testimony before the jury -- could, as a practical matter, be dispositive of the case. The difference between this critical live testimony and the non-testimonial visit to the crime scene involved in Snyder could not be more striking.

Moreover, this due process inquiry into the "totality" of the facts below cannot stop merely by drawing obvious distinctions between this case and Snyder. It must also take account of the fact that the record below gives no indication that anyone who

attended this competency hearing -- neither the judge, nor the prosecutor, nor the defense counsel -- was in any position, or had any basis, to evaluate the truthfulness of the answers given by the child witnesses concerning their grades in school, home addresses, attendance at Sunday school, or names of their teachers -- upon which the critical decision that they were competent to testify was entirely based. All of these critically important facts were simply accepted as true. No independent inquiry into these facts was made, and the accused -- who was the only person the record shows actually to have known something about the children (and the adequacy of whose "debriefing" by his non-Spanish-speaking counsel may be doubted) -- was simply not consulted about any conflicting information he may have had, or about any other lines of inquiry he thought it might be useful to explore.

As noted in the foregoing section, that the question at issue here concerns considerably more than a mere "gossamer of a possibility of prejudice", Snyder, supra at 122, is absolutely clear. Apart from the general concerns, discussed above, that proceedings of this sort sometimes inadvertently reinforce or create false testimony, in this particular case, on the facts as presented, even the trial judge himself acknowledged that the possibility of an erroneous decision was high; with respect to at least one of the child witnesses, the decision to allow her to testify was "somewhat close," at best.

Long before the Sixth Amendment was held applicable to the states, in Hopt v. Utah, supra, the Court upheld, as a federal constitutional matter, the right of a defendant to be present during jury selection because that guarantee was embodied in state law. The same situation is again presented

here. The Kentucky Supreme Court's repeated assertion of the "critical" and "crucial" nature of this phase of Kentucky criminal trial procedure plainly establishes for due process purposes that a defendant's presence at a mid-trial hearing into the competency of child witnesses during a Kentucky child sexual abuse trial "bears, or may fairly be assumed to bear, a relation, reasonably substantial," Snyder v. Massachusetts, supra at 106, to a Kentucky defendant's opportunity to defend, even in the absence of the other special circumstances prevailing here.

Because of the critical importance of witness competency hearings to child sexual abuse cases generally and (by a ruling of that state's highest court) to Kentucky child sexual abuse cases in particular, and the practical necessity of having the accused present when no one but the accused is in a position to verify or dispute the testimony

offered -- as well as the other impairments to the presentation of a coherent defense particular to this case -- under the "totality of the facts" standard articulated by the Court in Snyder, there can be no doubt that due process was offended by the involuntary exclusion of the accused from the "trial-like" mid-trial evidentiary proceeding that is at issue here.

C. Because The Defendant's Right to Participate in His Defense Is a Strictly Personal One, The Constitutional Errors Committed Here Were Not "Cured" By Allowing His Counsel To Attend The Competency Hearing

This Court has made clear that, in a criminal trial,

> [t]he right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction.

Faretta v. California, 422 U.S. 806, 834 (1975). Accordingly, although the Court has recognized that, when a defendant chooses to

proceed through counsel, law and tradition may allocate to counsel the power to make binding decisions of trial strategy,[14/] id. at 820, the Court has also been careful to make clear that counsel's role shall not become that of "an organ of the State interposed between an unwilling defendant and his right to represent himself personally," id. at 820, for

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant.

Id. (emphasis added). This is because the right to counsel provision of the Sixth Amendment "speaks of the 'assistance' of

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14/ The Court's decisions binding a defendant by such decisions of his counsel, see, e.g., Henry v. Mississippi, 379 U.S. 443 (1965); Fay v. Noia, 372 U.S. 391 (1963), plainly have no bearing on the present case. There is no suggestion here that counsel in any way intended to waive his client's right to be present as a conscious strategy choice. To the contrary, counsel made the appropriate motion concerning his client's presence and had it denied. (J.A.2).

counsel, and an assistant, however expert, is still an assistant." Id. The Court has consequently held that the Sixth Amendment, and our state and federal constitutional systems generally (including that of Kentucky),[15/] presuppose a right to self-representation in criminal prosecutions. Id. at 821.

In suggesting that the presence of defense counsel at the "trial-like" competency hearing at issue in this case suffices to satisfy constitutional prerequisites, petitioner and its amici effectively turn these basic principles upside down. As the Court has noted, one of the primary reasons for guaranteeing the right to a defendant's presence is precisely so that he will retain the continuing ability to "supersede his lawyers." Id. at 816 (quoting Snyder v. Massachusetts, supra) (emphasis in original),

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15/ See id. at 813 n.10.

something he plainly cannot do if he is not there. To argue that counsel's presence at a witness competency hearing such as the one at issue here suffices constitutionally is to argue that the Constitution may allow a lawyer to become a substitute, rather than an agent, for his client. While the Court indeed has held that a convicted person has no absolute right to argue his own appeal, even in the course of doing so it acknowledged that this ruling stands in "sharp contrast" to his "recognized privilege to conduct his own defense at trial". Price v. Johnston, 344 U.S. 266, 285 (1948).

In truth, of course, the right to be present is simply unrelated to the decision to exercise one's right to counsel. If one has a right to be present, that right does not evaporate when one elects to hire counsel; yet that is precisely the effect of any argument suggesting that the presence of

counsel can suffice. Where the presentation of exclusively "legal" arguments during trial is at issue, the relative deprivation may be less; but where the hearing is an evidentiary one, any rule that "trades" the right of presence with the right to have the "assistance" of counsel would raise serious questions of trial management[16/] and also of equal protection, as between defendants who have counsel and those who are pro se.

Not even petitioner suggests that a proceeding such as the one at issue here could legitimately be conducted ex parte. Consequently, the only rule that can pass constitutional muster is one recognizing that the right of counsel to attend a critical evidentiary hearing necessarily derives from

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16/ In order to assure the continuous exercise of his right to be present, for example, an accused would be encouraged to "fire" and "rehire" his attorney throughout the trial in order to enjoy the basic privilege to attend the proceedings against him which he regards as critical.

a corresponding and co-extensive right to be present on the part of the defendant. If the pro se defendant would have a right to attend this proceeding, which seems clear from the Court's decision in Faretta, then so too must the defendant who elects to proceed with the "assistance" of counsel.

III. EVEN IF THE COURT DOES NOT AFFIRM THE DECISION BELOW, IT SHOULD NONETHELESS VACATE DEFENDANT'S CONVICTION BECAUSE THE TRIAL COURT NEITHER MADE SPECIFIC FACTUAL FINDINGS NOR PURSUED ALTERNATIVES DESIGNED TO MINIMIZE THE IMPACT OF DEFENDANT'S INVOLUNTARY EXCLUSION

For the reasons set forth in the foregoing sections, amicus believes that the judgment below should not be disturbed. However, if the Court should be inclined to alter that judgment, it must nevertheless vacate defendant's conviction in this case.

Even if there existed circumstances which might justify the involuntary exclusion of an accused from a mid-trial "trial like"

competency hearing in some other particular child sexual abuse case, the present conviction is nonetheless still unconstitutional for at least two reasons: (1) The trial court made no effort to ascertain whether such conditions actually obtained here, and (2) the trial court did not explore the availability of alternative means, short of physical presence, by which the defendant could have continued to participate in his own defense during the critical competency hearing phase.

A. No Specific Fact-Finding

It is plain from the record below that the trial judge made no effort whatever to inquire whether the defendant's presence at the competency hearing in this case in fact presented any risk at all of actually intimidating -- or even inhibiting -- the child witnesses whose competency was in question. Given this Court's careful protection of the

right to be present, and its strong statements concerning the drastic nature of any decision to exclude a defendant from criminal trial proceedings directed against him, Illinois v. Allen, supra, it is plain that something more than an off-hand rejection of his request to attend the hearing is necessary to satisfy constitutional standards. Only if the defendant has no right to attend such hearings can the trial court's off-handed treatment of his request to stay in this case be upheld.

As the brief amicus curiae of the American Psychological Association makes clear, only such individual fact-finding is consistent with the current state of scientific knowledge concerning the potential for the presence of a defendant to intimidate or inhibit potential child witnesses. Given the state of that knowledge, any a priori rule against a defendant's attendance at a witness

competency hearing would necessarily sweep far too broadly and unnecessarily infringe upon fundamental liberty interests in hosts of cases where no real harm is even threatened. Therefore, in order to avoid constitutional infringements based on supposition and sentiment, rather than fact and science, a careful, particularized inquiry must at a minimum precede each and every decision to exclude a defendant from a child witness's mid-trial "trial-like" competency hearing over his objection.

In the case of a child sexual abuse victim undergoing a test for testimonial competency, it must be clear at a minimum[17/] (a)

17/ Given the Court's analysis in Illinois v. Allen, with its strong emphasis on the fundamental importance of the right to be present, amicus believes that the Constitution could well require that the defendant be shown to have a subjective intent to intimidate the witnesses against him, as opposed to his presence merely having that effect, before his involuntary exclusion would be permitted. However, because the trial court in this case made no findings concerning the alleged need to exclude the defendant, the Court [footnote cont'd]

that the proceedings cannot continue in an orderly fashion in the defendant's presence, and (b) that there is nothing he will or can do, while still present, to make it possible for them to proceed. Given the uncertainty inherent in any advance prediction of the likely effect of a particular defendant's presence upon a particular prosecution witness, in the absence of unusually strong and direct proof supporting such a prediction, the better practice would ordinarily be to begin the proceeding with the defendant present until such a time as an adverse effect on the ability for the hearing to proceed is experienced and shown. See Illinois v. Allen, supra.

If any "balancing" element is to be introduced into the decision to afford a criminal defendant the opportunity to exercise his right to be present at all testi-

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need not reach that question in this case.

monial phases of his trial, the other factors to be "balanced" must at least be demonstrated by clear and convincing proof actually to exist under the "totality of the facts," Snyder v. Massachusetts, supra, of the particular case.

Here, where no such showing or experience existed, vacating respondent's conviction would therefore still be required even if the Court concluded that the involuntary exclusion of a defendant from a child witness competency hearing might, at least theoretically, on some other occasion constitutionally be condoned.

B. Alternatives Short of Complete Exclusion

In addition, and apart from the absence of any inquiry into the specific need to exclude this defendant from the competency hearing, this conviction must also be vacated because of the trial court's failure to ex-

plore less drastic alternatives to the complete exclusion of defendant from participation in the conduct of his case during the witness competency hearing. As one member of the Court noted in Illinois v. Allen, supra, there is an important constitutional difference between removing a defendant from a hearing which his presence disrupts and completely excluding him from participation in his own defense. Illinois v. Allen, supra (Brennan, J., concurring).

Therefore, if the Court is inclined to distrub the judgment below, it should, in vacating respondent's conviction, hold that before a trial judge may order the complete exclusion of an accused from participation in the presentation of his defense during such a critical trial phase, the judge is constitutionally required to explore and, where feasible, employ these less drastic alternatives. Here, of course, the trial judge

did neither.

The options available to a judge in the position of the trial judge here are many, and their variety is growing, as the states' widespread experimentation with various audio and video link-up systems makes clear. While the Constitution plainly must require a trial judge to select the device most likely to maximize the defendant's ability to continue his participation in his case from among those at the particular trial judge's disposal (i.e., to employ a closed circuit audio/video hookup instead of a telephone connection, when both devices are at hand), none of these devices need be particularly expensive or sophisticated.

As other amici have noted, many states now mandate the use of closed circuit audio and/or video systems for various phases of child sexual abuse prosecutions, and even inexpensive one-way mirrors may serve

adequately as a means of ensuring that the accused has an opportunity to observe, as well as hear, the witnesses against him. A less satisfactory choice -- but a simple and inexpensive one -- would be a speaker-phone (already installed in many chambers), over which the defendant could hear the child's testimony, while communicating with his counsel over a separate, hand-held telephone, so that the child is insulated even from the defendant's voice. Intercom systems are yet another option, as are "walkie-talkie" devices such as those court officers routinely carry. Indeed, because the ordinary child sexual abuse defendant will not be overtly disruptive, in the manner of the obstreperous defendant in Illinois v. Allen, a simple screen might even serve the necessary purpose: The defendant could be seated behind the screen before the child enters the room, listen quietly to the witness's testimony,

and then confer with counsel while the child is asked briefly to step outside.

Some or all of these devices were almost surely available to the trial judge in this case. Yet not one of them was even considered, much less employed.

In the absence of <u>at least</u> an exploration of their availability, both the Sixth Amendment and due process were offended by the trial court's unnecessarily drastic, and factually unfounded, decision to ban defendant entirely from participation in the conduct of his defense in the course of the mid-trial "trial-like" evidentiary competency hearing at issue in this case.

CONCLUSION

For the reasons set forth above, the Court should dismiss certiorari as improvidently granted. In the event that it reaches the merits in this case, the judgment of the Supreme Court of Kentucky should be affirmed.

If the Court decides not to affirm that judgment, however, it should nonetheless still vacate respondent's conviction and remand the case for retrial, based upon the trial judge's failure (1) to find specific facts justifying respondent's involuntary exclusion from the mid-trial competency hearing, and (2) to explore the availability and feasibility of less drastic measures designed to ensure the orderly progress of that hearing.

Respectfully submitted,

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